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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

UITERWYK CORPORATION,
Petitioner

versus

CTI-CONTAINER LEASING CORPORATION,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals acted beyond the scope of its appellate jurisdiction over final orders under 28 U.S.C. §1291 by reviewing a district court order staying an admiralty proceeding pending a determination by the Iran-United States Claims Tribunal of its jurisdiction over the claim.

2. Whether the Circuit Court order vacating the stay of the claim of CTI-Container Leasing Corporation against Petitioner Uiterwyk Corporation, while severing and staying Petitioner's claim on the same transaction against its principal, Iran Express Lines, results in an unconstitutional taking of Petitioner's contract right to be indemnified, held harmless and defended in this action by its principal.

3. Whether under the Hostage Accords, the Iran-United States Claims Tribunal must be allowed to determine its own jurisdiction over claims which are concurrently pending before United States federal district courts and the Claims Tribunal before the claims can be adjudicated in United States Courts.

4. Whether the Court of Appeals erred as a matter of law by deciding that a district court stay order pending a determination by the Iran-United States Claims Tribunal of its jurisdiction is an abuse of discretion by the District Court because the length of the stay at the time it was entered was not subject to termination on a definite date.

5. Whether Iran Express Lines and the Islamic Republic of Iran are indispensible parties pursuant to Rule 19(b) of the Federal Rules of Civil Procedure having been tendered directly to Respondent-Plaintiff CTI-Container Leasing Corporation pursuant to Rule 14(c) of the Federal Rules of Civil Procedure.

6. Whether Respondent's claim is for judicial relief in connection with claims presented to the Iran-United

States Claims Tribunal, mandating a stay of such proceedings under the express terms of Executive Order 12,294. (Feb. 24, 1981).)

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The Petitioner, Uiterwyk Corporation, prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit filed on September 13, 1982.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dated September 13, 1982, reported at 685 F.2d 1284 (11th Cir. 1982) (A-1) reversed the Order of the United States District Court for the Middle District of Florida dated June 19, 1981 (A-16). This action, based upon claims arising under leases for ocean cargo containers for an Iranian shipping company, had been stayed by the District Court pending the determination of the Iran - United States Claims Tribunal of its jurisdiction to hear these claims.[2]

The United States Court of Appeals for the Eleventh Circuit held that it had jurisdiction to review the stay ordered by the District Court as a final order under 28 U.S.C. §1291. The Appeals Court held that it was an abuse of discretion for the District Court to stay this action pending a determination by the Tribunal of its jurisdiction over these claims. The Appeals Court found it could join the Iranian parties to this litigation, then sever and stay the action against them without considering the prejudicial effect on the remaining parties pursuant to Rule 19(b) of the Federal Rules of Civil Procedure.

Uiterwyk Corporation ("Uiterwyk") submitted a Petition for Rehearing with a Suggestion for Rehearing En Banc to the Court of Appeals, which was denied without opinion on October 18, 1982. (A-19).

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1. Parties to this proceeding below included Uiterwyk Corporation and CTI-Container Leasing Corporation. Uiterwyk Corporation has no parent companies nor does it own any stock or other equity interest in any other corporation.

2. The District Court order was entered in four cases, including this action. (A-16). In each action the United States had filed a Statement of Interest which set forth the obligations of the United States under the Iranian Hostage Accords.

JURISDICTION

The Judgment (A-18) and Opinion of the Court of Appeals for the Eleventh Circuit was filed on September 13, 1982. Uiterwyk Corporation filed a Petition for Rehearing with a Suggestion for Rehearing En Banc on October 1, 1982 which was denied by an Order of the Court of Appeals on October 18, 1982 (A-19). This Petition for a Writ of Certiorari has been filed within the time limits prescribed by law. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

TREATIES AND EXECUTIVE ORDERS INVOLVED

The construction and proper application of Executive Order 12,294, 46 Fed.Reg. 14,111, February 24, 1981, (A-21), the Declaration of the Government of the Democratic and Popular Republic of Algeria (A-24), and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, January 19, 1981, 46 Fed. Reg. 7913-32 (Jan. 23, 1981) (A-32) are directly involved in this Petition and are set out verbatim in the Appendix to this Petition.

STATEMENT OF THE CASE

This case resulted from the disruption of normal business relationships caused by the revolution in Iran. The total breakdown of commercial contact between U.S. entities and Iran occurred on November 4, 1979, when approximately 400 Iranians seized the American Embassy in Tehran, Iran taking Embassy personnel as hostages. Uiterwyk had been acting in the United States as general agent for an Iranian shipping company, Iran Express Lines ("IEL"), which operated vessels carrying containerized cargo from the East Coast of the United

States and the Far East to Iran. At the time of the revolution hundreds of containers leased for IEL were in Iran, where they remain.

After intensive negotiations the United States effected the release of the hostages in Iran. The "bargaining chip" used by the United States to resolve this crisis were the assets of the Iranian Government and nationalized companies, attached by private parties in the courts of the United States.[3]

The United States committed itself, as part of the Hostage Accords, to terminate all legal proceedings in the United States involving claims of United States persons and institutions against Iran and Iranian state enterprises. The United States further agreed to nullify all attachments and judgments obtained against Iranian property, to prohibit further litigation based on claims against Iran and its State enterprises and to bring about the termination of these claims through binding arbitration. On February 24, 1981 all domestic litigation against Iran was suspended by Executive Order No. 12,294 (46 Fed. Reg. 14,111) (A-21). It is the construction of Executive Order 12,294 as applied to the claims of the parties to this litigation that requires the attention of this Court.

Petitioner, Uiterwyk, is a United States corporation, with its principal place of business in Florida. Uiterwyk acts as an agent for entities whose business includes the carriage of cargo in the international maritime trade.

Uiterwyk was appointed general agent in the United States by IEL, an Iranian limited joint stock shipping company. Uiterwyk and IEL entered into a general agency agreement (A-38) which required Uiterwyk, *inter alia*, to act on behalf of IEL to obtain the containers necessary for the carriage of ocean cargo.

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3. On April 20, 1980 Uiterwyk Corporation had attached Iranian assets in the amount of $15,764,207.00 in the Chase Manhattan Bank, pursuant to Civil Action 80 Civ. 1520 (CES) S.D.N.Y.

Uiterwyk owned no vessels, and carried no cargo for its own account.

Uiterwyk entered into leases on behalf of IEL with numerous container lessors, including CTI-Container Leasing Corporation ("CTI").[4] The containers were used by IEL for the ocean shipment of cargoes to Iran. IEL was obligated to bear all expenses incurred in obtaining and using these containers. Certain containers remain in the custody and control of the Government of Iran and IEL. Subsequent to the revolution, IEL became an agency or instrumentality of the Government of Iran within the meaning of the Foreign Sovereign Immunities Act.

On October 6, 1980 CTI filed suit against Uiterwyk in the United States District Court for the Middle District of Florida in Tampa alleging the breach of six leases for ocean-going containers and related equipment.[5] In its Complaint CTI alleged both diversity and admiralty jurisdiction but specifically elected to proceed in the admiralty jurisdiction of the Court, and designated the claim as an Admiralty and Maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure (FRCP). On January 20, 1981 Uiterwyk filed its

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4. Each lessor drafted its own unique lease. CTI was and is the largest lessor of ocean containers in the world.

5. In addition to the Civil Action brought by CTI against Uiterwyk in the Middle District of Florida in Tampa, CTI brought the same action against Uiterwyk in the United States District Court for the District of Maryland, No. JH-80-313 (D.Md. filed February 8, 1980) and a similar action in the United States District Court for Savannah, Civil Action No. 480-282 (D.Ga. September 19, 1980). The action in Savannah was dismissed by that Court by Order of July 20, 1981. On January 21, 1982 the District Court in Maryland severed and stayed the Third-Party claims of Uiterwyk against Iran and IEL. The remainder of that action was referred to a Magistrate, who, on May 17, 1982 stayed the action of CTI against Uiterwyk pending review by the Eleventh Circuit Court of Appeals of the Stay Order issued in the Middle District of Florida. Subsequent to the Eleventh Circuit opinion Uiterwyk filed a Motion to transfer the Maryland action to the Tampa District Court.

Answer and defenses and, 15 days after filing its Answer, moved under FRCP Rule 14(c) for permission to join the Government of Iran and IEL, an agency or instrumentality of the Islamic Republic of Iran within the meaning of the Foreign Sovereign Immunities Act, ("FSIA") 28 U.S.C. §§1330, 1602-1611.

Based upon the allegations of CTI in its Complaint, Uiterwyk filed its Third-Party Complaint against IEL and Iran in which it alleged that Iran and IEL: (1) wrongfully converted or expropriated the containers which were the property of CTI; (2) were responsible for any unpaid rent due to CTI; (3) were solely and directly liable to CTI; and (4) were liable to Uiterywk by way of indemnity or contribution for any sums which Uiterwyk might be held liable to pay CTI.

Since the third-party impleader motion had not yet been granted on February 15, 1981 Uiterwyk filed separate actions against IEL and the Government of Iran based on the same claims and allegations of CTI raised in the Complaint of CTI and in the Third-Party Complaint.[6]

On March 10, 1981 the United States Department of Justice filed a Statement of Interest with the Clerk for the Middle District of Florida, which took the position that actions which were "arguably within" the jurisdiction of the Iran-United States Claims Tribunal ("Tribunal") were to be stayed pursuant to Executive Order 12,294. (Statement of Interest p. 1: "The United States accordingly requests that this Court (1) stay litigation of those claims against Iran *arguably* within the Tribunal's jurisdiction . . ." (emphasis added)) .

Uiterwyk filed a response to the Statement of Interest in which it stated that the litigation before the District Court should be stayed at least until the jurisdiction

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6. These protective actions were stayed by the District Court in Tampa by the same order that stayed the within matter. (M.D. Fla. Civil Action 81-107).

of the Tribunal was determined as to these claims.[7] On June 19, 1981 the District Court entered an Order in this action and in the separate actions filed by Uiterwyk against IEL and Iran, staying the actions ". . . pending determination by the Iran-United States Claims Tribunal of its jurisdiction to hear these claims." (A-18).

The Order of the District Court recognized the unique circumstances which arose in this matter from the suspension of litigation against Iran and its agencies or instrumentalities for foreign policy reasons. This extraordinary governmental action, approved by this Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), effectively removed IEL from this litigation. IEL was the principal on the alleged contracts, and as such had committed to hold harmless, indemnify and *defend* petitioner in all actions arising out of the agency relationship (Agency Agreement A-40). The District Court necessarily balanced the equities and realized that irreparable harm and prejudice to Uiterwyk would result from being forced to proceed in litigation in the United States absent IEL.

CTI appealed the Stay Order of the District Court to the United States Court of Appeals for the Eleventh Circuit. On September 13, 1982 the Court of Appeals held that it had jurisdiction over the appeal of the stay order as a final order under 28 U.S.C. §1291, and then held that the District Court had abused its discretion when it ordered a stay of the action. The Court of Appeals concluded that Iran and IEL were parties to be joined if feasible in this action under FRCP Rule 19(a), and that joining these parties would not divest the Federal Court of jurisdiction under Executive Order 12,294. The Court of Appeals, after joining Iran and IEL, severed and stayed these claims pursuant to the Executive Order, but allowed the remainder of the action to go forward.

7. Uiterwyk filed a claim before the Tribunal before the deadline of January 19, 1982. This claim includes the matters raised in this action.

Iran and IEL have taken contradictory positions in the United States and at the Tribunal. In other litigation in the United States, attorneys for Iran appeared on behalf of IEL, claimed sovereign status and the protection available under the FSIA, and requested that the actions against IEL be stayed pending adjudication at the Tribunal. (*IEL Answer: Backer Navid v. Cunliffe-Fraser, IEL, et al.*, Civil Action 81-136 (M.D. Fla. Tampa) (A-43, 45-48)). At the Tribunal, to attempt to avoid the jurisdiction of that panel, IEL claims to be a private corporation (Statement of Defense, IEL, filed November 15, 1982). IEL is presently available only before the Tribunal, which must resolve the issue of the status of IEL as a state or private entity in order to determine its own jurisdiction. When the jurisdictional issue is determined these claims will either go forward at the Tribunal or, if there is no jurisdiction found by the Tribunal, be revived in the District Court.

Executive Order 12,294 makes no explicit reference to the severance of claims. However, the Executive Order provided for a stay of all claims which "*may*" be in the jurisdiction of the Tribunal, *and* suspended ". . . all claims for equitable or other judicial relief in connection with claims presented to the Tribunal." (A-21). The plain language of Executive Order 12,294 suggests that the District Court properly interpreted that Order in staying this action.

JURISDICTIONAL STATEMENTS

This civil action was brought in the Middle District of Florida in Admiralty pursuant to 28 U.S.C. §1333.

The Court of Appeals for the Eleventh Circuit found that it had jurisdiction over this appeal as a final order pursuant to 28 U.S.C. §1291.

SUMMARY OF THE ARGUMENT IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

The District Court in Tampa acted properly, within the limits of its sound discretion and in compliance with Executive Order 12,294, in staying this matter pending a determination by the Iran-United States Claims Tribunal of its own jurisdiction to hear these claims involving containers leased for an Iranian shipping company. It would not be possible for the District Court to determine the relationships critical to the transactions in question absent Petitioner's principal, IEL.

The Tribunal must determine the status of IEL as a state or private entity in determining its jurisdiction. If it is determined that IEL is a government entity, the claim must be pursued against IEL at the Tribunal. If the Tribunal determines that IEL is not a government entity, the action in the District Court will revive. If the Tribunal determines that IEL is a private entity the Eleventh Circuit is in error in holding that IEL should be joined, and the action against IEL then "severed and stayed" pursuant to Executive Order 12,294 (Opinion A-15).

The Eleventh Circuit Court of Appeals acted beyond the boundaries of its limited appellate jurisdiction in reviewing this stay. The stay is a nonappealable interlocutory docket order in an admiralty case and is not a final order under 28 U.S.C. §1291. This Court has previously held that the stay of an admiralty matter on the District Court's own docket is not appealable. The decision of the Eleventh Circuit concerning the appealability of a stay order is in conflict with the First, Fifth and Seventh Circuits, and is contrary to the prior judgments of this Court.

After erroneously assuming jurisdiction, the Circuit Court misapprehended the underlying action and erred in its application of the guidelines concerning stays set down by this Court. The Circuit Court held, in essence,

that an "indefinite" stay (in the sense the stay abides the jurisdictional determination of the Tribunal) is *per se* immoderate and, therefore, objectionable. (Opinion A-10).

The Circuit Court, on a sparse record and without the trial court's knowledge of the proceedings, substituted its own balancing of equities between the parties for that of the trial court. The Circuit Court discounted the irreparable harm to petitioner as agent in being forced to defend this action without its principal, while simultaneously proceeding against the principal at the Tribunal.[8]

CTI can only allege it might be damaged by a possible delay if it should be required to await the jurisdictional determination of the Tribunal. This delay could be compensated by money damages if actually incurred, and cannot be considered irreparable harm. However, the Circuit Court mistakenly elevated this possibility of delay to a denial of justice. (Opinion A-8).

Executive Order 12,294 suspending litigation in the United States against Iran may work as an unconstitutional taking if the Tribunal fails to afford adequate relief. In *Dames & Moore v. Regan, supra,* at 688, this court determined that the taking issue was not yet ripe. However, Uiterwyk now has experienced an actual taking of its contractual rights if the Eleventh Circuit Order vacating the stay in Tampa is upheld since Uiterwyk was entitled by its agency contract to be defended by IEL in this litigation arising out of Uiterwyk's activities as general agent for IEL. (A-40). Under that contract Uiterwyk would have tendered to IEL its entire defense of the claims of CTI and would have incurred no attorneys' fees or expenses, and would have been insulated from risk. Executive Order 12,294 prevented the real

8. The Circuit Court chose to ignore the pleadings and, without any fact record whatsoever, found that the agency agreement upon which these containers were obtained and are now in Iran was not at issue. (A-12).

joinder of IEL in this litigation, and Uiterwyk cannot effectively tender its defense to IEL despite having properly asserted its claim under FRCP Rule 14(c) on the basis that IEL is wholly liable to CTI.

The stay order entered by the District Court temporarily relieved the prejudice to Uiterwyk from the loss of the right to be defended by IEL by postponing the litigation in Tampa until the Tribunal determined its jurisdiction over this claim. At that time, the Tribunal could protect Uiterwyk's interest in its contract or, if the Tribunal found that there was no jurisdiction, the District Court action would revive.

The Eleventh Circuit, by vacating the stay, caused the present loss of Uiterwyk's contract right to be defended by IEL. This constitutes an unconstitutional taking of Uiterwyk's property interest in the contract. The Eleventh Circuit ignored the domestic effect of Executive Order 12,294, so that its action would make that order unconstitutional as applied herein. In vacating the stay, the Eleventh Circuit acted in derogation of the foreign policy decisions made by the President and usurped the power of the Tribunal to determine its own jurisdiction. *Dames & Moore v. Regan, supra* at 684 and 688. The opinion and order of the Eleventh Circuit is contrary to the requirements of Executive Order 12,294 that all claims in connection with claims presented at the Tribunal be stayed.

Procedurally, the Court created an untenable fiction by "joining" then "severing" the Iranian defendants, and staying that portion of this action to avoid applying Rule 19(b) to determine the prejudice to Uiterwyk.

The Eleventh Circuit had no jurisdiction to render a judgment in this matter, and, having improperly assumed jurisdiction, proceeded to misapply the guidelines for reviewing a stay. The Eleventh Circuit acted in contravention of Petitioner's constitutionally protected contract rights and failed to properly construe and apply Executive Order 12,294.

The foregoing errors are contrary to the precedent established by this Court and conflict with the authority established in other circuits, and demonstrate a need for this Court to exercise its supervisory power to correct the errors of the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Lacked Judicial Power To Review The Stay Order Which Was A Nonappealable Interlocutory Order

An appeal from an otherwise interlocutory order should be permitted only when there is:

> an order, otherwise nonappealable, determining substantial rights of the parties *which will be irreparably lost if review is delayed until final judgment* . . . Citing *U.S. v. Wood*, 295 F.2d 772, 778 (5th Cir.) *cert den.* 369 U.S. 850 (1961); *Huckeby v. Frozen Food Express*, 555 F.2d 542, 549 (5th Cir. 1977).

The grant of a stay will not prejudice the rights of CTI which could also be subject to the jurisdiction of the Tribunal. Any delay which might be caused by the determination by the Tribunal of its jurisdiction could be compensated by money damages. Any delay does not result from an action of Petitioner, but arises because the Executive used private claims in the United States as a bargaining chip to resolve the Iranian hostage crisis.

However, Petitioner will suffer irreparable harm if the stay is vacated and will lose forever its contract right to be defended by its principal and to have its principal stand liable on its own obligations to CTI.

A District Court decision to stay a matter in admiralty has been determined to be a nonappealable interlocutory order. *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454 (1935). Such an order is a calendar

order issued within the Court's inherent power to regulate and to administrate its own business. *Castanho v. Jackson Marine, Inc.*, 650 F.2d 546 (5th Cir. 1981).

A. The United States Court of Appeals for the Eleventh Circuit Erred as a Matter of Law in Finding That a Stay Order Pending Arbitration Is Appealable Pursuant to 28 U.S.C. §1291, a Decision Which Is Contrary to the Precedent of this Court and Which Creates a Conflict Among the Circuits as to the Appealability of Stay Orders

The United States Court of Appeals for the Eleventh Circuit decided that the Stay Order of the District Court was reviewable as a final decision under 28 U.S.C. §1291, which states:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

The Court of Appeals found the sole basis for its appellate jurisdiction under section 1291. Jurisdictional arguments based on 28 U.S.C. §1292(a)(1) and the collateral order doctrine were not reached.[9] (Opinion A-6) The finding of the Eleventh Circuit that the stay order pending arbitration is reviewable as a final order under section 1291 is in direct conflict with decisions of this Court.

In *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454 (1935) petitioners filed libels in Admiralty in the District Court for the Northern District of California claiming damages for personal injuries alleged to have occurred on a vessel. The defendant applied to the Court for a stay pending arbitration. The District Court stayed the trial pending arbitration, while retaining ju-

9. As set forth *infra*, neither of these jurisdictional arguments would prevail.

risdiction to make orders and enter decrees otherwise permitted or required by law. The petitioners appealed and the Circuit Court of Appeals held that the stay orders were interlocutory and nonappealable and dismissed the appeal. The Supreme Court granted certiorari on the petitioner's argument that the decision was in conflict with other circuit court decisions which held that stay orders were final orders, and thus appealable. Petitioner asserted that the stay pending arbitration was a final order. This Court, rejecting that argument, responded:

> we announced decisions in *Enelow v. New York Life Insurance Co.*, 293 U.S. 379, and *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449, which definitely show that the [stay] orders are not final and therefore not appealable under §128, Judicial Code, 28 U.S.C., §225. [Footnote and citations omitted] *Id.* at 456.

Petitioner then argued that, even if not final, the stay in an admiralty case was appealable based on the *Enelow* rationale, arguing that a stay amounts to an injunction. This Court likewise rejected that argument in admiralty actions stating that:

> The cases now before us are in admiralty. The orders appealed from merely stay action in the court pending arbitration and filing of the award. As shown by the *Enelow Case*, they are not interlocutory injunctions within the meaning of §129. *Id.* at 457.

The Court analyzed the intent of Congress concerning the appealability of interlocutory orders in admiralty, stating that Congress, in having specifically provided for the interlocutory appeal of orders in admiralty determining the rights and liabilities of the parties,[10] did not in-

10. 28 U.S.C. §1292(a)(3) permits the appeal of interlocutory decrees ". . . determining the rights and liabilities of the parties to admiralty cases. . ."

tend to make appealable any other interlocutory decrees in admiralty. *Id.* at 458.

The decision of the Iran-United States Claims Tribunal has the effect of a binding arbitration (Declaration Art. IV A-34), and the District Court sitting in admiralty stayed this matter pending the jurisdictional determination of the Tribunal.

The Eleventh Circuit Court of Appeals was clearly incorrect in deciding that the District Court Order staying the proceedings in an admiralty matter was appealable as a final order under section 1291. In *Castanho v. Jackson Marine, Inc.*, 650 F.2d 546 (5th Cir. 1981), that court stated that a district court stay of an admiralty action on its own docket was a calendar order issued under the inherent power of the court to regulate the administration of its own business and that the stay order was not appealable. *Id.* at 548, citing *Anderson v. U.S.*, 520 F.2d 1027, 1028 (5th Cir. 1975) quoting *Penoro v. Reederi A/B DISA*, 376 F.2d 125, 128 (2d Cir.) *cert. den.* 389 U.S. 852 (1967).

In *Jenscnius v. Texaco, Inc., Marine Department*, 639 F.2d 1342 (5th Cir. 1981), the Court of Appeals held that the district court stay order pending proceedings before a state court in the same action was not appealable as a final order under 28 U.S.C. §1291 and was not appealable under section 1292(a)(1) as an interlocutory order granting or denying an injunction. The court reasoned that the stay order did not reach the merits of the claim, and in no way determined, denied or prejudiced any substantive rights of the parties, and therefore could not be said to be an interlocutory decree that determines the rights and liabilities of the parties so as to be appealable under section 1292(a)(3) applicable to admiralty proceedings *supra*, note 10.

The decision of the Court of Appeals for the Eleventh Circuit characterizing the stay order in this matter as an appealable order under 28 U.S.C. §1291 is in di-

rect conflict with the recent case of *Acton Corp. v. Borden, Inc.*, 670 F.2d 377 (1st. Cir. 1982). The First Circuit was confronted with the issue of the appealability of District Court orders which stayed an action while a related case in another district court was permitted to proceed. In its decision, the court analyzed the appealability of orders by district courts staying litigation on their own dockets pending proceedings in other forums and concluded that such orders are not appealable, either under Sections 1291 or 1292(a):

> Ordinarily, a decision by a district court to stay litigation before it pending developments in a different action involving the same issues is not appealable. Such a highly discretionary 'stay' decision, *Landis v. North American Co.*, 299 U.S. 248, 254-255 (1936), is neither 'final' nor equivalent to an 'injunction.' It thus provides no basis for an appeal under either §1291 or §1292(a). Id. at 380.

In *Whyte v. THinc Consulting Group Intern.*, 659 F.2d 817 (7th Cir. 1981) the Seventh Circuit held that an order staying judicial proceedings and directing arbitration that is entered as a part of a continuing proceeding for other relief and does not result in dismissal of the action is not a final order within the meaning of 28 U.S.C. §1291. Here, the District Court did not dismiss the CTI action, but merely stayed the action pending the jurisdictional determination of the Tribunal. As in *Whyte*, the judicial proceedings in this matter are continuing and the stay order is not an appealable final order under section 1291.

In finding that the District Court Order staying an admiralty proceeding on its own docket pending resolution of jurisdictional issues in a separate forum was appealable, the Eleventh Circuit Court of Appeals' opinion is contrary to the authority in the First, Fifth and Seventh Circuits and constitutes an "unauthorized ex-

tension . . . of jurisdiction . . ." *Shanferoke Coal Corp. v. Westchester Corp.*, 293 U.S. 449, 451, (1935). The Eleventh Circuit opinion conflicts with the opinion of this Court and of the Fifth Circuit in regard to the appealability of stays in admiralty proceedings. Additionally, in holding that a stay is a final order under section 1291, the Eleventh Circuit is in direct conflict with the First and Seventh Circuits in regard to the finality of a stay order under section 1291.

This Court should correct the action of the Eleventh Circuit Court of Appeals to bring it into conformity with the precedent of this Court and to resolve the conflict among the circuits concerning the appealability of stay orders as final orders under 28 U.S.C. §1291.

II. In Finding an Abuse of Discretion by the District Court and in Vacating the Order of the District Court Staying This Litigation Pending Determination by the Iran-United States Claims Tribunal of its Jurisdiction over these Claims the Court of Appeals Erred as a Matter of Law in its Application of the Standard of Review.

It is necessary for this Court to exercise its supervisory powers to correct the misapplication by the Court of Appeals of the standard of review to be applied to the exercise of the inherent discretionary authority of the District Court to stay litigation pending the outcome of related proceedings in other forums. The Court of Appeals holding is contrary to the Supreme Court's guidance in *Landis v. North American Co.*, 299 U.S. 248 (1936).

Landis established that the power to stay proceedings is incidental to the inherent power of a court to control the disposition of the cases on its docket, and set the guidelines by which the grant of a stay could be measured to determine whether the stay is appropriate pend-

ing the resolution of related proceedings in other forums. In *Landis*, the Attorney General had moved to stay an action in the District Court for the District of Columbia pending resolution of a test case in the Southern District of New York involving different parties but seeking enforcement of the same federal act. The District Court granted the stay to allow not only the proceedings at the trial court but through all appeals, even to the Supreme Court.

The Supreme Court found that it was appropriate — especially in cases "of extraordinary public moment" — that a party be required to submit to a "not immoderate" delay, pending related proceedings in another forum, *Landis*, *supra*, at 256. The stay as ordered by the District Court in *Landis* was excessive only insofar as the stay continued in effect *after* the decision in the other forum and allowed appeals up to and including the Supreme Court. *Landis*, *supra*, at 256.

The Supreme Court did not set any absolute guideline as to the length of the stay that would be considered "immoderate", but approved the entry of a stay which was "indefinite" to the extent that it would abide the outcome of a related matter in the trial court. The opinion stated that the stay would have been acceptable through the resolution of the test case at the District Court level, but not for all appeals. The stay, although indefinite, was not "immoderate" at least for such time as would have been required for a decision by the trial court.

In the instant action the Court of Appeals mistakenly equated indefinite with immoderate. The Court of Appeals stated that "It is difficult to accurately predict the time that CTI will be forced to stand aside if it is required to await the Tribunal's determination of its jurisdiction to hear these claims, but it can safely be described as an indefinite period of time" (Opinion A-10).

The Eleventh Circuit had already erroneously stated the *Landis* rule, as applied in *McKnight v.*

Blanchard, 667 F.2d 477, 479 (5th Cir. 1982) as allowing a stay order to be vacated ". . . as an abuse of discretion because the stay continued an action for an indefinite period of time." (Opinion A-10).[11] Indefiniteness, or the lack of a precise statement concerning the amount of time to be allowed to permit the Tribunal to determine its jurisdiction does not make the stay "immoderate". This stay is analgous to the stay awaiting the proceedings in a district court, which the Supreme Court in *Landis* noted with approval. A stay pending the outcome of proceedings before the Iran-United States Claims Tribunal, under the *Landis* case, would not be immoderate.

The Court of Appeals substituted its discretion for that of the District Court and erroneously found that "The danger of denying justice by delay for CTI outweighs Uiterwyk's possible inconvenience and costs of piecemeal review." (Opinion A-9). However, the only danger to CTI in this case is a possible delay, compensible by the payment of money damages and, therefore, no irreparable harm can occur to CTI. The danger to Uiterwyk is irreparable prejudice in that, absent IEL in the District Court, Uiterwyk will lose its contract rights allocating risk under its agency contract and Uiterwyk could be held liable for the obligations of its principal.

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11. The *McKnight* case actually involved the loss of civil rights as a result of a stay. A prisoner complained that his treatment *in prison* violated his civil and constitutional rights, and brought an action for damages *and* injunctive relief. The District Court stayed the action until the prisoner would be released from prison, in seven (7) to 14 years. Obviously, the prisoner's claims for injunctive relief from the loss of his civil rights while he was incarcerated would be moot after his release.

III. The Decision of the Court of Appeals for the Eleventh Circuit Which Reverses the District Court's Stay Order Results in an Unconstitutional Taking of Uiterwyk's Property Without Just Compensation.

Uiterwyk as a general agent for IEL, an Iranian shipping company, leased marine cargo containers from CTI for the use of IEL in the transportation of ocean cargoes. As part of its contractual relationship with Uiterwyk, IEL agreed to hold harmless, indemnify and defend Uiterwyk from any action brought as a result of the performance of the agency contract, including the lease of the marine cargo containers. (A-40). As a result Uiterwyk has a present contract right to be defended by IEL in any action brought by CTI for the alleged breach of the agreements for the lease of cargo containers. Absent the stay ordered by the District Court, the contract right of Uiterwyk to be defended by IEL is lost, and Uiterwyk must bear accrued legal expenses for which IEL has contracted to be liable and attempt to defend itself on the contracts.

Valid contracts are compensible property interests subject to the strictures of the Fifth Amendment. *Lynch v. United States*, 292 U.S. 571, 579 (1934). A claim based on a contract vests at the time of the breach of that contract. *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933). Uiterwyk has a present property interest in its contractual right to be defended and indemnified by IEL in this litigation, which vested when IEL breached its contract by failing to appear and defend Uiterwyk against the claims of CTI.

While the action by CTI against Uiterwyk was stayed along with the inextricably connected claims of Uiterwyk against Iran and IEL, Uiterwyk suffered no present irreparable loss of rights under its agency contract, although it was obligated to proceed at the Tribunal to enforce that contract. The claim of Uiterwyk at the

Tribunal is, *inter alia*, that IEL be held solely liable to CTI. However, absent the stay in the District Court, Uiterwyk has forever lost its right under its contract to be defended by IEL in that action.

Article I, Section 10 of the United States Constitution provides that "no state shall . . . pass any . . . law impairing the obligation of contracts." The impairment of contracts clause of the Constitution is specifically addressed to states, but a similar measure of protection against contract impairment by the federal government is given through the due process clause of the Fifth Amendment. *Lynch v. The United States*, 292 U.S. 571, 579 (1934).

Governmental acts which, ". . . derogate from substantial rights" under a contract violate the contracts clause even though the contract has not been destroyed, extinguished or declared invalid. *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934).

In analyzing the government action which impaired the contract, and caused the loss of Uiterwyk's property interest in its contract rights, the Court must evaluate whether a less drastic action could achieve the desired results to avoid the impairment of the contract. *See, United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 28-32 (1977).

The stay of this action pending the decision of the Tribunal as to its jurisdiction over the matter in question allowed the enforcement of Uiterwyk's contract rights without prejudice to the substantive claim of CTI. The decision of the Eleventh Circuit Court of Appeals allowing part of this matter to go forward, in conjunction with Executive Order 12,294 which stayed the remainder, constitutes an unconstitutional violation of the contract clause by irreparably denying Uiterwyk's contract right to a defense by its principal. In the event the Tribunal determined it had no jurisdiction over IEL, Uiterwyk would be free to enforce its contract right to compel IEL to assume Uiterwyk's defense in this action. If the Tri-

bunal finds it has jurisdiction, then this claim can be resolved before the Tribunal.

Presidential power is circumscribed by the Constitution, *New York Times Co. v. The United States*, 403 U.S. 713 (1971). Presidential Executive Orders have the force and effect of statutes, and rules of statutory construction will be applied. *Feliciani v. U.S.*, 297 F.Supp. 1356 (P.R. 1969), *aff'd.*, 422 F.2d 943 (1st Cir.), *cert. den.*, 400 U.S. 823 (1970). Executive Order 12,294 states:

> All claims which *may* be presented to the Iran-United States Claims Tribunal under the terms of Article II of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, and all claims for equitable or other judicial relief *in connection* with such claims, are hereby suspended, except as they may be presented to the Tribunal. (Emphasis added) (A-21).

When language is capable of two interpretations, one constitutional and the other unconstitutional, the constitutional reading should be preferred. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). The Eleventh Circuit interpretation of Executive Order 12,294 would unconstitutionally impair Uiterwyk's contract with IEL by allowing CTI to pursue its claim against Uiterwyk but severing and staying the claims against IEL. The Eleventh Circuit reading of the Executive Order thereby impairs the contract rights of Uiterwyk to be defended by IEL in this action, and erroneously determines the extent of the Tribunal's jurisdiction by excluding CTI's claim from being one which *may* be presented to the Tribunal. Since the constitutional reading is to be preferred, the Eleventh Circuit erred by staying part of this litigation while allowing the remainder to go forward, without the Iranian entities, before the Tribunal has de-

termined its jurisdiction over these claims. In order for Executive Order 12,294 to be constitutional, the correct interpretation as applied to the circumstances of the case under review requires that this *entire* litigation be stayed pending the decision of the tribunal as to its jurisdiction.

In violation of the Fifth Amendment of the Constitution, the decision of the Court of Appeals effected the taking without just compensation of Uiterwyk's contract right to be defended. The Court of Appeals compounded its error by creating a fiction in support of its decision to deny a stay of the action between CTI and Uiterwyk, while staying the third-party action against Iran and IEL. The Court of Appeals held that Iran and IEL are parties necessarily joined to the action pursuant to FRCP 19, and, upon allowing such joinder, severed and stayed those actions, without consideration of the prejudice foreseen in FRCP 19(b) and in disregard of Uiterwyk's rights.

The Court of Appeals for the Eleventh Circuit is obliged to apply Executive Order 12,294 in a constitutional manner. Because the Order is broad enough to suspend all claims which may be presented to the Tribunal, the Order can be constitutionally applied to this action only by staying the entire action, including the claims by CTI against Uiterwyk which are "claims *which may be presented* to the Iran-United States Claims Tribunal." (Emphasis added) (A-21).

IV. The Court of Appeals Misapprehended the Effect of Rules 14(c) and 19 of the Federal Rules of Civil Procedure and Erred in Failing to Apply Rule 19(b)

Impleader in an admiralty matter under Rule 14(c) is permitted where the party to be joined is either: (1) liable to defendant/third-party plaintiff; or (2) liable to plaintiff directly. In this action Uiterwyk, in its Third-Party Complaint, made clear that IEL and Iran were di-

rectly liable to CTI as the principal on the lease contract as well as liable to Uiterwyk on the general agency agreement and by indemnity. Pursuant to Rule 14(c) ". . . the action shall proceed as if the plaintiff [CTI] had commenced it against the third-party defendant [IEL and Iran] as well as the third-party plaintiff [Uiterwyk]." *Northern Contracting Co. v. C. Langenfelder & Sons, Inc.*, 439 F.Supp. 621, (E.D.Pa. 1977)

The Court of Appeals held that Iran and IEL *were* parties to be joined under Rule 19(a), and then effectively prevented the joinder of these parties by the fiction of joining and then severing and staying the third-party claims against Iran and IEL. The Court improperly avoided the required evaluation of indispensability under Rule 19(b).

IEL, the disclosed principal of Uiterwyk, is liable to CTI for any provable breaches of the alleged container lease contracts. IEL is a nationalized or otherwise controlled entity of the government of Iran and, therefore, claims against IEL are subject to the jurisdiction of the Iran-United States Claims Tribunal.

Additionally, the containers that are the subject of this litigation remain in Iran, under the possession, custody and control of IEL and the Government of Iran. The retention of these containers by Iran and IEL, in addition to the apparent breach of contract, constitutes the unlawful taking and conversion of the property upon which CTI bases its claim. These same breaches of obligation, both contractual and tortious, are the basis for the cause of action proceeded on in the District Court and are the basis for the claim before the Tribunal. The claims should be asserted against Iran and IEL, the parties in breach and wrongfully in possession of the containers. The claims against IEL and Iran are inextricably related to this litigation and cannot be severed. *State Mutual Life Insurance Co. of America v. Arthur Anderson Company of America*, 63 F.R.D. 389, 394 (S.D.N.Y. 1974), 65 F.R.D. 519, 522 (S.D.N.Y. 1975).

Rule 19 requires that the court determine whether, in equity and good conscience, the action should proceed among the parties or should be dismissed absent the presence of necessary parties. Rule 19(b) in its relevant part states:

> The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him *or those already parties*; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. (Emphasis added).

The Circuit Court erred in failing to apply Rule 19(b) to determine whether IEL and Iran were indispensable parties, or that the District Court acted properly in staying this action to prevent injustice. Absent Iran and IEL, prejudice to Uiterwyk must occur. The Eleventh Circuit erred in attempting to avoid the requisite determination of indispensability by the fiction of "granting" joinder, and immediately severing the action under Rule 42(b), and then staying the action under Executive Order 12,294.

Executive Order 12,294 suspends all claims which *may* be presented to the Tribunal. The claims of CTI fall within the broad definition of arbitral claims. (Art. IV, A-36). Since the CTI claims are arguably within the jurisdiction of the Tribunal, they should be stayed.

If it were not for the unique circumstances created by the resolution of the Iranian hostage crisis, this action could have gone forward in the United States District Court with all necessary parties present, including IEL. The action of the United States in settling the hostage

crisis, including the vacating of Uiterwyk's attachment of Iranian assets in New York, clearly controls the course of this litigation.

The underlying factual basis for this claim is the failure of IEL to return or pay for the containers in question. This claim may be, and has been, asserted at the Tribunal. It is inequitable to compel Uiterwyk to proceed separately before the District Court and the Tribunal on the same issues, where Uiterwyk sustains severe prejudice in the District Court through the loss of its contractual and procedural rights to be defended by IEL, at least until the Tribunal determines its jurisdiction over IEL.

V. The Decision of the Court of Appeals for the Eleventh Circuit Vacating the District Court's Orders Staying This Litigation Pending Determination by the Iran-United States Claims Tribunal of Its Jurisdiction Over These Claims is Contrary to Executive Order 12,294, is a Usurption of the Tribunal's Jurisdiction and Power and Is Contrary to the Decision of this Court in Dames & Moore v. Regan, 453 U.S. 654 (1981).

Executive Order No. 12,294 suspends all claims "which may be presented" to the Tribunal, and "all claims for equitable or judicial relief in connection with such claims." (A-21)

The Executive Order, Section 3, provides that the Claims Tribunal shall itself resolve all disputes as to jurisdiction:

> Suspension under this Order of a claim or a portion thereof submitted to the Iran-United States Claims Tribunal for adjudication shall terminate upon a determination *by the Tribunal* that it does not have jurisdiction over such claim or such portion thereof. (Emphasis Added) (A-22).

The Settlement Agreement states that "It is the purpose of [the United States and Iran] . . . to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration." (A-24 - 25). Under the agreement, the United States is obligated

> to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation *based on such claims*, and to bring about the termination of such claims through *binding arbitration*. (Emphasis added) (A-25).

The President's extraordinary exercise of power in suspending claims was upheld by this Court where "the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another . . . ." *Dames & Moore v. Regan*, 453 U.S. 654, 688, (1981). This Court found it significant that the President provided an alternate forum, capable of providing meaningful relief, in order to resolve claims and disputes. *Id.* at 686.

Executive Order No. 12,294 does not divest the Federal Courts of jurisdiction but only suspends claims. The Court states:

> As we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will 'revive' and become judicially enforceable in United States courts." *Dames & Moore*, *supra*, at 684, 685.

The Tribunal has the power to determine its own jurisdiction. Those claims which the Tribunal rejects as not being properly before it revive in the Courts of the United States. The stay order of the District Court in this

action was in accord with Executive Order 12,294 and the power of the Tribunal under the Hostage Accord to determine its jurisdiction, and with the holding of this Court in *Dames & Moore*, that claims be suspended, to be revived if the Tribunal determines they are not within its jurisdiction.

The Court of Appeals' reversal of the District Court Order is contrary to Executive Order 12,294, and further usurps the power of the Tribunal to decide its own jurisdiction, which was specifically granted to the Iran-United States Claims Tribunal by Executive Agreement and recognized in Section 3 of the Executive Order which provides for the domestic enforcement of the Executive Agreement.

By vacating the Order of the District Court staying the Civil Action until the determination by the Iran-United States Claims Tribunal of its jurisdiction to hear the underlying claims, the Court of Appeals encroached on the power of the Claims Tribunal to determine its own jurisdiction. The Eleventh Circuit approach conflicts with that of the Fifth Circuit Court of Appeals. The Supreme Court should take this opportunity to establish a clear mandate as it relates to the power of the Tribunal to establish its jurisdiction over claims which may be brought before it.

In *Gulf Ports Crating Co. v. Ministry of Roads, etc.*, 674 F.2d 318 (5th Cir. 1982) the Fifth Circuit Court of Appeals had the opportunity to consider the issue of what claims are suspended by the Executive Order. In *Gulf Ports Crating Co.*, the plaintiff sought to recover storage charges and security costs incurred as a bailee in storing goods purchased by the defendant, the Iranian Ministry of Roads and Transportation. Gulf Ports sought and was granted a writ of prejudgment attachment. The United States filed a Statement of Interest which asserted that the 1981 Declarations between the United States and Iran and the Executive Orders required the District Court to vacate the writ of attachment and to

stay the action on the Gulf Ports claim since it was under the jurisdiction of the Iran-United States Claims Tribunal. The District Court followed this recommended course of action and plaintiff Gulf Ports appealed the District Court's decision. Gulf Ports argued that its claim was improperly suspended because it did not fall within the class of claims assigned to the Arbitral Tribunal. The Court of Appeals rejected Gulf Ports arguments concluding that the claim fell within the broad definition of arbitral claims. The Court of Appeals for the Fifth Circuit further emphasized that the issue as to which claims were within the jurisdiction of the Claims Tribunal was not one properly before it. The Court states:

> We also note that any disputes as to the tribunal's jurisdiction are to be resolved by the tribunal itself and that Executive Order 12,294 provides for suspension of all claims that *may* be presented to the tribunal. *Id.* at 320. (Emphasis in original)

The question of the Tribunal's power to determine its own jurisdiction was discussed in *Jafari v. Islamic Republic of Iran*, 539 F.Supp. 209 (N.D.Ill. 1982). In that case the plaintiff, a former Iranian national, sought to recover money owed him for a claim of wrongful expropriation of property in Iran. Plaintiff became a United States' citizen on March 17, 1981, after the seizure of the property but before the filing of his suit. The District Court decided that it did not have jurisdiction to consider his claim.

> Kianoosh was not a United States citizen when the acts that triggered his claims occurred, or indeed when the Accords were signed or the Order promulgated. He was however such a citizen both when he filed his claim with the Tribunal and when he later filed this action. Thus the application of the Accords to Kianoosh's claims may be open to question. But consistent with the general concept of 'ju-

> risdiction to decide jurisdiction,' Section 3 of the Order leaves it to the *Tribunal* to decide whether a particular claim is within its jurisdiction. Once Kianoosh has invoked its power, he must await its decision of that question before he can pursue his claims elsewhere. *Id.* at 212. (Emphasis in original, footnotes omitted)

The District Court concluded that, at least until the Tribunal were to reject jurisdiction over the plaintiff's claim, the claim before the District Court would be *dismissed* without prejudice.

The District Court in Tampa stayed this matter on June 19, 1981 pending the Tribunal's determination of its own jurisdiction over claims before it. The stay order was entered seven months prior to the filing deadline with the Tribunal. Uiterwyk filed its claim with the Tribunal, which includes, *inter alia*, the claim of CTI for the lost containers and unpaid rentals. The District Court did not dismiss the CTI action, as did the *Jafari* Court in Illinois, but merely stayed the action pending the jurisdictional determination of the Tribunal.

CONCLUSION

The District Court acted within the sound exercise of its discretion, and was in compliance with Executive Order 12,294 and the interests of justice, in staying this action. The Court of Appeals acted without judicial power in reviewing this nonappealable interlocutory order, and misapprehended and misapplied the recognized guidelines for judging a stay by equating "indefinite" with "immoderate".

The vacating of the District Court stay and the severance and stay of the claims against IEL and Iran effect an unconstitutional taking of Petitioner's contract rights, and an impairment of Petitioner's contract.

Contrary to Executive Order 12,294, and the opin-

ion of this Court in *Dames & Moore v. Regan*, the Eleventh Circuit usurped the prerogative of the Tribunal in determining the Tribunal's jurisdiction.

The opinion of the Eleventh Circuit is in conflict with the precedent of this Court, and conflicts with the holdings of the Circuit Courts for the First, Fifth and Seventh Circuits.

This case presents an important and recurring issue concerning the appealability of interlocutory stay orders and places in issue the ability of the Iran — United States Claims Tribunal to function, a significant issue concerning the foreign affairs power of the United States.

Accordingly, a Writ of Certiorari should be issued to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit of September 13, 1982 in the within matter.

Respectfully submitted,

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December 1, 1982

[2762] CTI-CONTAINER LEASING CORPORATION,
Plaintiff-Appellant,

v.

UITERWYK CORPORATION,
Defendant-Appellee.

No. 81-5758.
United States Court of Appeals,
Eleventh Circuit.

Sept. 13, 1982.

Delaware corporation sued Florida corporation alleging breach of leases for ocean cargo containers and other related equipment. Florida corporation moved to implead Iran and an alleged instrumentality of Iran as third-party defendants. The United States Department of Justice filed statements of interests and, in response, the United States District Court for the Middle District of Florida, at Tampa, Ben Krentzman, Chief Judge, without ruling on impleader motion, stayed the action. On appeal by the Delaware corporation, the Court of Appeals, Walter E. Hoffman, District Judge, sitting by designation, held that joinder of Iran and such alleged instrumentality was feasible, and District Court's objectives of adhering to Iran-United States Agreement and executive order suspending claims of American citizens against Iran and statements of interests filed by United States requesting stay could best be accomplished by denying motions for stay of entire action and joining third-party defendants but severing and staying third-party actions, and it was abuse of discretion to order stay of entire action.

Vacated and remanded.

Synopses, Syllabi and Key Number Classification
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CTI-Container Leasing Corp. v. Uiterwyk Corp. *(Cont.)*

1. Federal Courts ⇐ 559

Federal Court of Appeals had jurisdiction to review district court's order staying action against Florida corporation in response to statements of interests filed by the United States requesting stay pending determination by Iran-United States Claims Tribunal of its jurisdiction to hear the claims. Fed. Rules Civ. Proc. Rules 9(h), 14, 42(a), 28 U.S.C.A.; 28 U.S.C.A. §§ 1291, 1292(a)(1); Executive Order No. 12294, § 1 et seq., 50 U.S.C.A. § 1701 note.

2. Action ⇐ 68

District court's stay order as it affected Florida corporation's third-party claims against Iran and alleged instrumentality of Iran was mandatory in nature, such claims having been suspended by executive order because they were clearly within jurisdiction of Iran-United States Claims Tribunal, and district court was required to stay such claims although it nevertheless retained jurisdiction over them, but portion of order staying principal action by Delaware corporation against Florida corporation was discretionary only and was subject to review for abuse. 28 U.S.C.A. §§ 1291, 1292(a)(1); Executive Order No. 12294 § 1 et seq., 50 U.S.C.A. § 1701 note.

3. Federal Civil Procedure ⇐ 203

First step in indispensable party determination requires decision as to whether joinder of person in question is feasible. Fed. Rules Civ. Proc. Rule 19(b), 28 U.S.C.A.

CTI-Container Leasing Corp. v. Uiterwyk Corp. *(Cont.)*

4. International Law ⇐12

Executive order suspending claims of American citizens against Iran did not divest federal courts of jurisdiction. Executive Order No. 12294 § 1 et seq., 50 U.S.C.A. § 1701 note.

2763] **5. Action ⇐60, 68**

In action by Delaware corporation against Florida corporation wherein latter moved to implead Iran and alleged instrumentality of Iran, joinder of Iran and such alleged instrumentality was feasible, and district court's objectives of adhering to Iran-United States agreement and executive order suspending claims of American citizens against Iran and statements of interests filed by United States requesting stay could best be accomplished by denying motions for stay of entire actions and joining third-party defendants but severing and staying third-party actions, and it was abuse of discretion to order stay of entire action. Executive Order No. 12294, §1 et seq., 50 U.S.C.A. §1701 note; Fed. Rules Civ. Proc. Rules 19, 19(a), 42(b), 38 U.S.C.A.

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, ANDERSON, Circuit Judge, and HOFFMAN*, District Judge.

WALTER E. HOFFMAN, District Judge:

In October 1980, CTI-Container Leasing Corporation (CTI) brought this action against Uiterwyk Corporation (Uiterwyk) alleging the breach of leases for ocean

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*Honorable Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.

CTI-Container Leasing Corp. v. Uiterwyk Corp. *(Cont.)*

cargo containers and other related equipment[1]. Jurisdiction was asserted under diversity and admiralty and CTI designated its claim as a maritime claim within the meaning of Fed.R.Civ.P.9(h). In February 1981, Uiterwyk moved to implead Iran and IEL as third-party defendants pursuant to Fed.R.Civ.P.14. In March 1981, the United States Department of Justice filed the first of several Statements of Interest which expressed the United States' position concerning litigation involving American nationals and Iranian entities as a consequence of the Iran-United States Agreement that obtained the release of the American hostages in January 1981. On June 19, 1981, the district court without having ruled on Uiterwyk's impleader motion, stayed this action with the following order:

In each of these cases[2] the United States has filed a
[2764] statement of interest, and subsequent to that, a supplemental statement of interest.

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1. CTI had previously brought the nearly identical cause of action based on the alleged breach of the same leases with slightly different monetary damages requested in the United States District Court for the District of Maryland in February 1980. CTI filed this action in the United States District Court for the Middle District of Florida while the Maryland action was pending.

Uiterwyk filed a third-party complaint against the Government of Iran (Iran) and Iran Express Lines (IEL) in the Maryland action. On January 21, 1982, the district court in Maryland severed and stayed the third-party claims against Iran and IEL. CTI's principal action against Uiterwyk was referred to a magistrate on April 12, 1982 for a hearing, report, and recommendation as to all dispositive pre-trial matters. On May 17, 1982, the magistrate in Maryland stayed the principal action of CTI against Uiterwyk pending our review of the stay issued in the Middle District of Florida.

2. In addition to Uiterwyk's impleader motion, it also filed separate actions against Iran and IEL, *Uiterwyk Corp. v. Iran Express Lines*, No. 81-107-Civ-T-K (M.D. Fla., filed Feb. 15, 1981); *Uiterwyk Corp. v. Iran Express Lines*, No. 81-108-Civ-T-K (M.D. Fla., filed Feb. 15, 1981). The June 19, 1981 stay order stayed these

The statement, in effect, is a motion for a stay of these proceedings, as a result of the agreement between the United States and the Government of Iran on January 19, 1981. 46 *Fed. Reg.* 7913-32 (January 23, 1981).

The Court is of the opinion that these cases should be, and they are, STAYED, pending determination by the Iran-United States Claims Tribunal of its jurisdiction to hear these claims. *See* Exec. Order No. 12,294, 46 *Fed. Reg.* 14,111 (Feb. 26, 1981)[3].

We now decide CTI's appeal of this stay order.

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actions along with the instant action, and another action against Uiterwyk, *Recovery Services Int'l Inc. v. Uiterwyk*, No. 81-39-Civ-T-K (M.D. Fla., filed Jan. 15, 1981).

Uiterwyk argued that the district court's "consolidated" stay order was, in effect, a Fed.R.Civ.P.42(a) consolidation. Uiterwyk argued that this consolidation properly placed the third-party defendants before the court. Such a conclusion would bolster Uiterwyk's argument concerning the validity of the stay order. However, we conclude that the district court's stay order was not a Rule 42(a) consolidation and our review of the stay order is limited to CTI's action against Uiterwyk.

3. Exec. Order No. 12,294, 46 Fed.Reg. 14,111 (1981) provides, in pertinent part:

> All claims which may be presented to the Iran-United States Claims Tribunal under the terms of Article II of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Government of the Islamic Republic of Iran, and all claims for equitable or other judicial relief in connection with such claims, are hereby suspended, except as they may be presented to the Tribunal. During the period of this suspension, all such claims shall have no legal effect in any action now pending in any court of the United States. . . .

The authority of the President to suspend claims pursuant to Exec. Order No. 12,294 was upheld in *Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).

CTI-Container Leasing Corp. v. Uiterwyk Corp. *(Cont.)*

I. FACTS

CTI is a Delaware corporation with its principal place of business in New York and is a lessor of ocean carrier cargo containers. Uiterwyk is a Florida corporation and acted as agent for entities whose business included carriage of cargo in international trade.

CTI as lessor and Uiterwyk as lessee entered into a number of leases for ocean cargo containers and other related equipment which are the basis of this action. CTI alleged that Uiterwyk failed to pay its obligations under such leases. Uiterwyk argued that it entered into the leases as agent for IEL,[4] which was an Iranian corporate entity and is now an alleged instrumentality of Iran. Uiterwyk alleged that IEL transported the containers and related equipment to Iran where they remain in custody and control of IEL and Iran.

II. DISCUSSION

2. *A. Appellate jurisdiction.*

[1] Uiterwyk argued that this court lacks appellate jurisdiction to review the district court's stay order. CTI argued that the stay order is reviewable as a 28 U.S.C. §1291[5] "final decision" pursuant to *Hines v. D'Artois*, 531 F.2d 726 (5th Cir. 1976).[6]

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4. There was no indication in the leases in question that Uiterwyk was acting as agent for Iran, IEL, or any other party.

5. 28 U.S.C. §1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

6. We do not reach CTI's appellate jurisdiction arguments on 28 U.S.C. § 1292(a)(1) and the collateral order doctrine.

[2765] **CTI-CONTAINER LEASING CORP. v. UITERWYK CORP.**

In *Hines*, the Fifth Circuit found a stay order appealable because the order operated in practical effect as a "final order" under § 1291. The district court in *Hines sua sponte* stayed plaintiffs' 42 U.S.C. § 1983 employment discrimination action until plaintiffs initiated proceedings before the Equal Employment Opportunity Commission (EEOC) and pursued such proceedings to final administrative action. The Fifth Circuit held such order appealable because its practical effect placed plaintiffs out of court. See *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2, 82 S.Ct. 1294, 1296 n.2, 8 L.Ed.2d 794 (1962). The court concluded that the district court abused its discretion in staying the action until the conclusion of administrative proceedings and reversed the stay order.

The Fifth Circuit relied on the following factors to treat the stay order as appealable under § 1291. First, the court cited *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53, 85 S.Ct. 308,. 310-311, 13 L.Ed.2d 199 (1964), for the principles that "the requirement of finality is to be given a practical rather than a technical construction," and when "deciding the question of finality the most important competing considerations are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." (citations omitted). The court stated that such a practical construction of the finality doctrine "requires that when a plaintiff's action is effectively dead, the order which killed it must be viewed as final. Effective death should be understood to comprehend any extended state of suspended animation." *Hines, supra*, at 730; *see also McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982).

Second, the circumstances of the case reinforced

the court's conclusion that the stay order was a final order for § 1291 purposes. No EEOC complaint had been filed when the stay order was entered and a minimum delay of eighteen months was needed for final EEOC processing. The effect of such a "protracted and indefinite delay", *id.*, at 732, was to put plaintiffs effectively out of court.

Finally, the district court had not yet addressed the merits of the action when it entered the stay order, and therefore, "the inconvenience and costs of piecemeal review" were outweighed by "the danger of denying justice by delay." *Id.* The Fifth Circuit decided that these factors favored treating the stay as a final order, and we likewise feel that similar factors exist in the instant case that make this stay order a final order subject to appellate review.

The danger of denying justice by delay for CTI outweighs Uiterwyk's possible inconvenience and costs of piecemeal review. We have no way to estimate the months or even years that may pass before Uiterwyk's claims against Iran and IEL are decided by the Iran-United States Claims Tribunal ("Tribunal"), *see NIC Leasing, Inc. v. Uiterwyk Corp.*, No. 81 Civ. 3866, slip op. at 9 (S.D.N.Y. March 1, 1982), and CTI, an American corporation, should not be denied its day in court against Uiterwyk, another American corporation, because the Tribunal might at some future date assert jurisdiction over Uiterwyk's action against Iran and IEL.
[2766] Furthermore, Uiterwyk's argument that the delay from the stay order is outweighed by the possibility of inconsistent results from piecemeal review is without merit. CTI did not institute an action against Iran or IEL. Uiterwyk's claims against these two parties are contingent upon a finding in the district court of Uiterwyk's liability to CTI before the Tribunal can accurately enter a judgment in the Uiterwyk and Iran-IEL dispute.

By staying the action pending the Tribunal's determination of its jurisdiction over Uiterwyk's claim for a protracted and indefinite period, the district court placed CTI in an "extended state of suspended animation." *Hines, supra,* at 730. The practical effect of the stay order placed CTI "effectively out of court" and for such reason we hold that the stay order was a "final" order subject to appellate review under § 1291.

B. *Merits of the stay order*

[2] CTI and Uiterwyk disagree as to whether the district court's stay order was a mandatory or discretionary stay. We conclude that the stay order as it affected Uiterwyk's third-party claims against Iran and IEL was mandatory in nature because such claims were suspended by Executive Order No. 12,294 as they are clearly within the Tribunal's jurisdiction. The district court was required to stay those claims, although it nevertheless retained jurisdiction over them. *See Dames & Moore, supra,* 453 U.S. at 684, 101 S.Ct. at 2989. We agree with the district court's stay order as it pertains to the stay of the third party action, but reach a contrary conclusion concerning the stay of the principal action of CTI against Uiterwyk. This portion of the stay order was discretionary in nature as the district court was not required to stay an action between two American corporations.[7]

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7. As the United States stated in its Second Supplemental Statement of Interest, which was filed in the Maryland action, only claims of nationals of the United States against Iran and claims of nationals of Iran against the United States are within the Tribunal's jurisdiction. Therefore, we agree with the view of the United States that CTI's claims against Uiterwyk are not within the Tribunal's jurisdiction and not suspended by Executive Order 12,294. In addition, the United States also stated that a stay of this entire action *may* be appropriate; we disagree with this conclusion for the reasons stated herein.

CTI-Container Leasing Corp. v. Uiterwyk Corp. *(Cont.)*

The inherent discretionary authority of the district court to stay litigation pending the outcome of related proceeding in another forum is not questioned. *See generally Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 665, 98 S.Ct. 2552, 2558, 57 L.Ed.2d 504 (1978); *Landis v. North American Co.*, 299 U.S. 248, 255, 57 S.Ct. 163, 166, 81 L.Ed. 153 (1936); *P. P. G. Industries Inc. v. Continental Oil Co.*, 478 F.2d 674 (5th Cir. 1973). Our review of such an exercise of discretion is limited to an abuse of discretion standard. *See McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982).

In *McKnight*, the Fifth Circuit recently vacated a stay order as an abuse of discretion because the stay continued an action for an indefinite period of time. In *McKnight*, the court stated:

> The district court has a general discretionary power to stay proceedings before it in the control of its docket and in the interests of justice. Nevertheless, stay orders will be reversed when they are found to be immoderate of an indefinite duration. In *Landis v. North American Co.*, 299 U.S. 248 [57 S.Ct. 163, 81 L.Ed. 153] (1936), the Supreme Court held that a "stay is immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits, so far at least as they are susceptible of prevision and description."

667 F.2d at 479 (citations omitted).

[2767] It is difficult to accurately predict the time that CTI will be forced to stand aside if it is required to await the Tribunal's determination of its jurisdiction to hear these claims, but it can safely be described as an indefinite period of time. We cannot uphold such an indefinite or immoderate stay despite Uiterwyk's arguments to the contrary. We, therefore, agree with the procedural posture taken by other courts in similar litigation arising out of Uiterwyk's involvement with Iran and IEL. *See NIC*

Leasing Inc. v. Uiterwyk Corp., No. 81 Civ. 3866 (S.D.N.Y. March 1, 1982); *Cotco Leasing Co. v. Uiterwyk Corp.*, No. 80-706 (E.D.Pa. Nov. 9, 1981); *Xtra, Inc. v. Uiterwyk Corp.*, No. 79-1021-Civ.-T-H (M.D. Fla. Aug. 25, 1981). *But see Itel Corp. v. M/S Victoria U*, No. 80-2328 (E.D.La. Sept. 23, 1981), *appeal docketed*, No. 82-3129 (5th Cir. Feb. 24, 1982).[8] These courts that were faced with third party complaints have severed and stayed the third-party actions against Iran and IEL while allowing the principal actions against Uiterwyk to proceed to trial.

Uiterwyk argued that the stay of the entire action should be affirmed because: (1) it will be prejudiced in developing its evidence[9] without the presence of IEL and Iran who are necessary for a comprehensive disposition at one time of the rights of the parties to litigation arising out of the same facts; (2) it will be subjected to significant costs of duplicative proceedings before the district court and the Tribunal; and (3) IEL and Iran are indispensable parties to the litigation.

First, Uiterwyk's argument that it may be prejudiced in developing evidence to support its agency de-

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8. A stay was granted in the *Itel* case, but *Itel* is distinguishable because no third-party action was filed in that case. CTI argued that plaintiff's cause of action in *Itel* "was based on leases showing IEL as lessee; Uiterwyk as lessee; IEL c/o Uiterwyk as lessee; and IEL c/o Nippon Umpansha, Ltd. as lessee." Reply Brief for Appellant at 22. Uiterwyk did not dispute this assertion and Uiterwyk's counsel admitted at oral argument that *Itel* was not a similar case, but only cited as an example of possible prejudice that might ensue if the action was not stayed. Indeed, possible prejudice might ensue in an action when named defendants-lessees-agents are not before the court because of Executive Order 12,294. However, this is not the situation in the present action and, therefore, *Itel* is inapposite to these circumstances.

9. Although not emphasized in its brief, Uiterwyk asserted at oral argument, that its status as agent for IEL provides a meritorious defense to CTI's claims and such status cannot be proved without the presence of IEL and Iran at trial.

fense without the third-party defendants' presence is not a determinative factor in our decision concerning the stay. An alleged agency agreement between Uiterwyk and IEL is not at issue; it is the contract between CTI and Uiterwyk that is the focus in the principal action. Uiterwyk also will not be hampered by the third-party defendants' absence in attempting to substantiate its impossibility of performance and force majeure defenses. The historical context of the Iran-United States Agreement has not been disputed and CTI has not questioned the factual basis for these affirmative defenses.

Second, Uiterwyk will not be subjected to any undue hardship of duplicative costs by proceeding with the principal action. It will not suffer significant overlapping costs and preparation for proceeding in the Tribu-
768] nal because we agree with the district court that the third-party claims should be stayed because such claims are within the Tribunal's jurisdiction. Furthermore, any extra costs Uiterwyk might incur do not outweigh the serious harm to CTI if it is compelled to stand aside for an indeterminate period of time to await the Tribunal's decision.

[3] Third, Uiterwyk argued that Iran and IEL are indispensable parties under F.R.Civ.P. 19(b) because CTI's claims are inextricably related to Uiterwyk's claims against IEL and Iran. It is not necessary to analyze the factors enumerted in Rule 19(b)[10] to determine

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10. Fed.R.Civ.P. 19 provides, in pertinent part:
(a) Persons To Be Joined If Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to

if IEL and Iran are indispensable parties, because "Rule 19(b) deals with the determination a court should make whenever joinder of an interested person is not feasible." *Gertner v. Hospital Affiliates International Inc.*, 602 F.2d 685, 688 (5th Cir. 1979). Hence, the first step in an indispensable party determination requires a decision as to whether joinder of the person in question is feasible. *See Challenge Homes, Inc., v. Greater Naples Care Center, Inc.*, 669 F.2d 667 at 669 (11th Cir. 1982).

[4] The district court did not rule on Uiterwyk's motion to join IEL and Iran as third-party defendants and CTI argued that such joinder would deprive the court of jurisdiction under Executive Order 12,294 and violate Rule 19(a). However, we agree with Uiterwyk's argument on this point that "Executive Order 12,294 purports only to 'suspend' the claims not divest the fed-

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a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination By Court Whenever Joinder Not Feasible. If a person as described in subdivison (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

eral court of 'jurisdiction.' " *Dames & Moore v. Regan, supra,* 453 U.S. at 684, 101 S.Ct. at 2989.

The court in *Challenge Homes, supra,* stated that in making the decision whether the party in question should be joined if feasible under the Rule 19(a), "pragmatic concerns, especially the effect on the parties and the litigation, control." *Challenge Homes, supra,* at 669 (citations omitted). We conclude, viewing the Rule
769] 19(a) factors in light of pragmatic concerns, that joinder of IEL and Iran is feasible and was also the course followed by other courts faced with the same decision. *See NIC Leasing Corp., supra; Cotco Leasing, Inc., supra; Xtra, Inc., supra.*

III. CONCLUSION

[5] We feel that the district court's objectives of adhering to the Iran-United States Agreement, Executive Order 12,294, and the Statements of Interests filed by the United States can best be accomplished by following the paths taken by the courts in the *NIC Leasing*, *Cotco Leasing*, and *Xtra* cases. In these cases, Uiterwyk's motions for a stay of the entire actions were denied and the third party defendants were joined, but such third-party actions were severed under Rule 42(b), and stayed pursuant to Executive Order No. 12,294. The parties were directed to proceed with their respective principal actions. Therefore, we conclude that district court abused its discretion when it ordered a stay of this entire action. We vacate the district court's stay order and remand the action to the district court for proceedings not inconsistent with this opinion.[11]

VACATED AND REMANDED.

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11. We take cognizance of the fact that in the substantially identical action in Maryland, *CTI-Container Leasing Corp. v. Uiterwyk Corp.*, No. JH-80-313 (D. Md., filed Feb. 8, 1980), the district court severed and stayed the third-party action and referred the action to a magistrate. The magistrate subsequently stayed the principal action pending our decision. *See*, note 1, *supra*. We, in effect, approve of the action taken by the district court in Maryland. However, upon remand of this action to the Middle District of Florida, it remains to be decided by the two district courts as to which court will proceed to trial with the principal action. Clearly, the same parties in substantially the exact same litigation should not be permitted to proceed simultaneously in two separate district courts, but we leave the decision of which district court will proceed to trial to the discretion of the district courts involved.

IN THE UNITED STATES DISTRICT COURT
For The Middle District of Florida
Tampa Division

CTI-CONTAINER LEASING CORPORATION, *Plaintiff*	:	
vs	:	Case No. 80-1113-Civ-T-K
UITERWYK CORPORATION *Defendant.*	:	
	:	
RECOVERY SERVICES INTERNATIONAL INC., *Plaintiff*	:	
vs	:	Case No. 81-39-Civ-T-K
IRAN EXPRESS LINES AND UITERWYK CORPORATION *Defendants*	:	
	:	
UITERWYK CORPORATION *Plaintiff*	:	
vs	:	Case No. 81-107-Civ-T-K
IRAN EXPRESS LINES AND THE GOVERNMENT OF IRAN *Defendants*	:	
	:	
UITERWYK CORPORATION, et al *Plaintiff*	:	
vs	:	Case No. 81-108-Civ-T-K
IRAN EXPRESS LINES AND THE GOVERNMENT OF IRAN *Defendants*	:	
	:	

ORDER

In each of these cases the United States has filed a statement of interest, and subsequent to that, a supplemental statement of interest.

The statement, in effect, is a motion for a stay of these proceedings, as a result of the agreement between the United States and the Government of Iran on January 19, 1981. 46 *Fed. Reg.* 7913-32 (January 23, 1981).

The Court is of the opinion that these cases should be, and they are, STAYED, pending determination by the Iran-United States Claims Tribunal of its jurisdiction to hear these claims. *See* Exec. Order No. 12,294, 46 *Fed. Reg.* 14,111 (Feb. 26, 1981).

IT IS SO ORDERED at Tampa, Florida, this 19 day of June, 1981.

Ben Krentzman
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 81-5758

D.C. Docket No. 80-1113-CIV-T-K

CTI-CONTAINER LEASING CORPORATION,

Plaintiff-Appellant,

versus

UITENWYK CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

Before GODBOLD, Chief Judge, ANDERSON, Circuit Judge, and HOFFMAN*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, VACATED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that costs on appeal will be taxed at a later date.

September 13, 1982

*Honorable Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.

ISSUED AS MANDATE: NOV 15 1982

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5758

CTI-CONTAINER LEASING CORPORATION,
Plaintiff-Appellant,

versus

UITERWYK CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC
(Opinion September 13, 11 Cir., 1982, F.2d).

(October 18, 1982)

Before GODBOLD, Chief Judge,
ANDERSON, Circuit Judge and
HOFFMAN*, District Judge

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled

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* Honorable Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.

on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

Entered for the Court:

John Godbold
United States Circuit Judge

EXECUTIVE ORDER 12294

SUSPENSION OF LITIGATION AGAINST IRAN

By the authority vested in me as President by the Constitution and statutues of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which were based the declarations of national emergency in Executive Order No. 12170 issued November 14, 1979, and in Executive Order No. 12211, issued April 17, 1980, in light of the agreement with the Government of Iran, as reflected in the Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of United States diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, in order to implement Article II of the Declaration of Algeria concerning the settlement of claims and to begin the process of normalization of relations between the United States and Iran, it is hereby ordered that as of the effective date of this Order:

Section 1. All claims which may be presented to the Iran-United States Claims Tribunal under the terms of Article II of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, and all claims for equitable or other judicial relief in connection with such claims, are hereby suspended, except as they may be presented to the Tribunal. During the period of this suspension, all such

claims shall have no legal effect in any action now pending in any court of the United States, including the courts of any state or any locality thereof, the District of Columbia and Puerto Rico, or in any action commenced in any such court after the effective date of this Order. Nothing in this action precludes the commencement of an action after the effective date of this Order for the purpose of tolling the period of limitations for commencement of such action.

Section 2. Nothing in this Order shall require dismissal of any action for want of prosecution.

Section 3. Suspension under this Order of a claim or a portion thereof submitted to the Iran-United States Claims Tribunal for adjudication shall terminate upon a determination by the Tribunal that it does not have jurisdiction over such claim or such portion thereof.

Section 4. A determination by the Iran-United States Claims Tribunal on the merits that a claimant is not entitled to recover on a claim shall operate as a final resolution and discharge of the claim for all purposes. A determination by the Tribunal that a claimant shall have recovery on a claim in a specified amount shall operate as a final resolution and discharge of the claim for all purposes upon payment to the claimant of the full amount of the award, including any interest awarded by the Tribunal.

Section 5. Nothing in this Order shall apply to any claim concerning the validity or payment of a standby letter of credit, performance or payment bond or other similar instrument.

Section 6. Nothing in this Order shall prohibit the assertion of a counterclaim or set-off by a United States national in any judicial proceeding pending

or hereafter commenced by the Government of Iran, any political subdivision of Iran, or any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

Section 7. The Secretary of the Treasury is authorized to employ all powers granted to me by the International Emergency Economic Powers Act and by 22 U.S.C. §1732 to carry out the purposes of this Order.

Section 8. Executive Order Nos. 12276 through 12285 of January 19, 1981, are ratified.

This Order shall be effective immediately and copies shall be transmitted to the Congress.

Ronald Reagan
Barbara E. Sukie
Certified to be a True Copy.

THE WHITE HOUSE
February 24, 1981.

DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA

The Government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the United States of America to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran, has consulted extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran. On the basis of formal adherences received from Iran and the United States, the Government of Algeria now declares that the following interdependent commitments have been made by the two governments:

GENERAL PRINCIPLES

The undertakings reflected in this Declaration are based on the following general principles:

A. Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9.

B. It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the Government of each

party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration, relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

Point I: Non-Intervention in Iranian Affairs

1. The United States pledges that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs.

Points II and III: Return of Iranian Assets and Settlement of U.S. Claims

2. Iran and the United States (hereinafter "the parties") will immediately select a mutually agreeable central bank (hereinafter "the Central Bank") to act, under the instructions of the Government of Algeria and the Central Bank of Algeria (hereinafter "The Algerian Central Bank") as depositary of the escrow and security funds hereinafter prescribed and will promptly enter into depositary arrangements with the Central Bank in accordance with the terms of this declaration. All funds placed in escrow with the Central Bank pursuant to this declaration shall be held in an account in the name of the Algerian Central Bank. Certain procedures for implementing the obligations set forth in this Declaration and in the Declaration of the Democratic and Popular Republic of Algeria concerning the settlement of claims

by the Government of the United States and the Government of the Islamic Republic of Iran (hereinafter "the Claims Settlement Agreement") are separately set forth in certain Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Democratic and Popular Republic of Algeria.

3. The depositary arrangements shall provide that, in the event that the Government of Algeria certifies to the Algerian Central Bank that the 52 U.S. nationals have safely departed from Iran, the Algerian Central Bank will thereupon instruct the Central Bank to transfer immediately all monies or other assets in escrow with the Central Bank pursuant to this declaration, provided that at any time prior to the making of such certification by the Government of Algeria, each of the two parties, Iran and the United States, shall have the right on seventy-two hours notice to terminate its commitments under this declaration.

If such notice is given by the United States and the foregoing certification is made by the Government of Algeria within the seventy-two hour period of notice, the Algerian Central Bank will thereupon instruct the Central Bank to transfer such monies and assets. If the seventy-two hour period of notice by the United States expires without such a certification having been made, or if the notice of termination is delivered by Iran, the Algerian Central Bank will thereupon instruct the Central Bank to return all such monies and assets to the United States, and thereafter the commitments reflected in this declaration shall be of no further force and effect.

ASSETS IN THE FEDERAL RESERVE BANK

4. Commencing upon completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank

of all gold bullion which is owned by Iran and which is in the custody of the Federal Reserve Bank of New York, together with all other Iranian assets (or the cash equivalent thereof) in the custody of the Federal Reserve Bank of New York, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3 above.

ASSETS IN FOREIGN BRANCHES OF U.S. BANKS

5. Commencing upon the completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank, to the account of the Algerian Central Bank, of all Iranian deposits and securities which on or after November 14, 1979, stood upon the books of overseas banking offices of U.S. banks, together with interest thereon through December 31, 1980, to be held by the Central Bank, to the account of the Algerian Central Bank, in escrow until such time as their transfer or return is required in accordance with Paragraph 3 of this Declaration.

ASSETS IN U.S. BRANCHES OF U.S. BANKS

6. Commencing with the adherence by Iran and the United States to this declaration and the claims settlement agreement attached hereto, and following the conclusion of arrangements with the Central Bank for the establishment of the interest-bearing security account specified in that agreement and Paragraph 7 below, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank, within six months from such date, of all Iranian deposits and securities in U.S. banking institutions in the United States, together with interest thereon, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3.

7. As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing security account in the Central Bank, until the balance in the security account has reached the level of $1 billion. After the $1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the security account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the claims settlement agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the security account has fallen below $500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of $500 million in the account. The account shall be so maintained until the President of the Arbitral Tribunal established pursuant to the claims settlement agreement has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the claims settlement agreement, at which point any amount remaining in the security account shall be transferred to Iran.

OTHER ASSETS IN THE U.S. AND ABROAD

8. Commencing with the adherence of Iran and the United States to this declaration and the attached claims settlement agreement and the conclusion of arrangements for the establishment of the security account, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank of all Iranian financial assets (meaning funds or securities) which are located in the United States and abroad, apart from those assets referred to in Paragraph 5 and 6 above, to be held by the Central Bank in escrow until their transfer or return is required by Paragraph 3 above.

9. Commencing with the adherence by Iran and the United States to this declaration and the attached claims settlement agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.

NULLIFICATION OF SANCTIONS AND CLAIMS

10. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will revoke all trade sanctions which were directed against Iran in the period November 4, 1979, to date.

11. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.

Point IV: Return of the Assets of the Family of the Former Shah

12. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will freeze, and prohibit any transfer of, property and assets in the United States within the control of the estate of the former Shah or of any close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets as belonging to Iran. As to any such defendant, including the estate of the former Shah, the freeze order will remain in effect until such litigation is finally terminated. Violation of the freeze order shall be subject to the civil and criminal penalties prescribed by U.S. law.

13. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will order all persons within U.S. jurisdiction to report to the U.S. Treasury within 30 days, for transmission to Iran, all information known to them, as of November 3, 1979, and as of the date of the order, with respect to the property and assets referred to in Paragraph 12. Violation of the requirement will be subject to the civil and criminal penalties prescribed by U.S. law.

14. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will make known, to all appropriate U.S. courts, that in any litigation of the kind described in Paragraph 12 above the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine and that Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law.

15. As to any judgment of a U.S. court which calls for the transfer of any property or assets to Iran, the United States hereby guarantees the enforcement of the

final judgment to the extent that the property or assets exist within the United States.

16. If any dispute arises between the parties as to whether the United States has fulfilled any obligation imposed upon it by Paragraphs 12-15, inclusive, Iran may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the claims settlement agreement. If the tribunal determines that Iran has suffered a loss as a result of a failure by the United States to fulfill such obligation, it shall make an appropriate award in favor of Iran which may be enforced by Iran in the courts of any nation in accordance with its laws.

SETTLEMENT OF DISPUTES

17. If any other dispute arises between the parties as to the interpretation or performance of any provision of this declaration, either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the claims settlement agreement. Any decision of the tribunal with respect to such dispute, including any award of damages to compensate for a loss resulting from a breach of this declaration or the claims settlement agreement, may be enforced by the prevailing party in the courts of any nation in accordance with its laws.

Initialed on January 19, 1981

by _____
Warren M. Christopher

Deputy Secretary of State of the Government of the United States

By virtue of the powers vested in him by his Government as deposited with the Government of Algeria

DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA CONCERNING THE SETTLEMENT OF CLAIMS BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN.

The Government of the Democratic and Popular Republic of Algeria, on the basis of formal notice of adherence received from the Government of the Islamic Republic of Iran and the Government of the United States of America, now declares that Iran and the United States have agreed as follows:

ARTICLE I

Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this agreement shall be submitted to binding third-party arbitration in accordance with the terms of this agreement. The aforementioned six months' period may be extended once by three months at the request of either party.

ARTICLE II

1. An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other

measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position.

2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.

3. The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that declaration.

ARTICLE III

1. The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously. Within ninety days after the entry into force of this agreement, each government shall appoint one-third of the members. Within thirty days after their appointment, the members so appointed shall by mutual agreement select the remaining third of the members and appoint one of the remaining third President of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three methods set forth above.

2. Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the parties or by the Tribunal to ensure that this agreement can be carried out. The UNCITRAL rules for appointing members of three-member Tribunals shall apply *mutatis mutandis* to the appointment of the Tribunal.

3. Claims of nationals of the United States and Iran that are within the scope of this agreement shall be presented to the Tribunal either by claimants themselves, or, in the case of claims of less than $250,000, by the Government of such national.

4. No claim may be filed with the Tribunal more than one year after the entry into force of this agreement or six months after the date the President is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by Paragraphs 16 and 17 of the Declaration of the Government of Algeria of January 19, 1981.

ARTICLE IV

1. All decisions and awards of the Tribunal shall be final and binding.

2. The President of the Tribunal shall certify, as prescribed in Paragraph 7 of the Declaration of the Government of Algeria of January 19, 1981, when all arbitral awards under this agreement have been satisfied.

3. Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.

ARTICLE V

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

ARTICLE VI

1. The seat of the Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States.

2. Each government shall designate an agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal.

3. The expenses of the Tribunal shall be borne equally by the two governments.

4. Any question concerning the interpretation or application of this agreement shall be decided by the Tribunal upon the request of either Iran or the United States.

ARTICLE VII

For the purposes of this agreement:

1. A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively,

natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.

2. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity, is not itself entitled to bring a claim under the terms of this agreement. Claims referred to the Arbitral Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.

3. "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

4. The "United States" means the Government of the United States, any political subdivision of the United States, any agency, instrumentality or entity controlled by the Government of the United States or any political subdivision thereof.

ARTICLE VIII

This agreement shall enter into force when the Government of Algeria has received from both Iran and the United States a notification of adherence to the agreement.

Initialed on January 19, 1981

by _____

Warren M. Christopher

Deputy Secretary of State
of the Government of the
United States

By virtue of the powers vested in him by his Government as deposited with the Government of Algeria.

AGENCY AGREEMENT

Agency agreement made and entered into between Iran Express Lines ("Principal") and Uiterwyk Corporation ("Agent").

I. SCOPE

Principal hereby appoints Agent as its General Agent in the U.S. for Iran Express Lines between the U.S. Gulf and Atlantic Coast ports and various ports in the Persian Gulf for the conduct of business of all its vessels whether owned, chartered and/or managed, upon the terms and conditions hereinafter set forth.

II. GENERAL AGENCY

Agent agrees to perform services for Principal as herein provided. Agent will perform according to the terms and conditions of the Agreement and such instructions as Principal may give from time to time. Such periodic instructions must reach Agent by telex at least three full days prior to schedule implementation in order to be considered timely. Any additional costs incurred due to untimely delivery of instructions by Principal will be for Principal's account.

Agent will not accept, without prior concurrence of Principal, any agency for the territory described in Article I which will compete with Principal's services. Principal agrees to assign to Agent similar representation as defined in Article I of any future services established or vessel activities controlled by itself or affiliated or associated organizations.

Owner hereby undertakes to remit to Agent, in advance and promptly upon request, any and all funds as may be required by Agent to perform his duties and obligations as defined in this Agreement.

Agent shall have the right to appoint sub-agents to perform any of the duties and/or obligations of Agent in any

or all areas subject to this Agreement. Prior consent of Principal shall be required for appointment of a sub-agent, but such consent may be withheld only where Principal has clearly justifiable commercial reasons.

III. AGENCY FUNCTIONS

A. Agent shall attend to the berthing, loading, discharging and dispatch of all vessels in accordance with the instructions of Principal. Agent shall arrange for berthing, stowage, clerking, checking, receiving and delivering cargoes and shall generally perform all functions customarily undertaken by berth agents. Loading and discharging berths shall be selected by Agent with the advice of Principal. All contracts for stevedoring, supplies and other services to be performed for the vessels to be arranged by Principal. Prior consent of Principal is required for any advance made by Agent to Master, provided that Agent shall be reimbursed by Principal for any advances made to Master in any situation where prior approval of Principal is not feasible due to the dictates of time or communications.

B. Agent shall execute freight booking contracts on behalf of Principal and shall issue or cause to be issued to shippers of cargo dock permits, dock receipts and bills of lading for the carriage of goods on vessels covered by this Agreement. Agent shall report regularly to Principal as to cargo bookings, position of vessels, amendment of port tariff and other charges. Freight booking contracts shall specify that all freight be assessed in accordance with tariff regulations, discountless, ship and/or cargo lost or not lost. The bills of lading shall be in such form as prescribed by Principal, but Agent shall always exercise due diligence to see that all bills of lading are properly issued in accordance with applicable law. Agent shall assist Principal when called upon in the handling, adjustment and settlement of any claims.

C. Agent shall collect on behalf of Principal any monies due Principal by reason of Agents activities under this Agreement. Agent shall have the right to deduct from any monies collected on behalf of Principal any sums owed by Principal to Agent. In addition agent shall, for Principal's account, pay necessary disbursements and an accounting shall be rendered by Agent for each vessel at each port as soon as practicable.

IV. REMUNERATION

A. Agent shall be reimbursed at actual cost for all expenses properly chargeable to the account of the vessels, including but not limited to inward and outward port charges, towage, stevedoring, clerking, tallying, watching, wharfage, preparation of shipping documents, cablegrams, telegrams, teletypes and long distance telephone calls necessary for the fulfillment of Agent's obligations and duties under this Agreement.

B. Agent shall receive for services the following:
General Agency Commission:

Outbound	7-½% Total Ocean Freight
Inbound	3-¾% Total Ocean Freight

V. INDEMNITY

Principal shall indemnify, hold harmless and defend Agent against any and all claims and demands (including, but not limited to, costs and attorney's fees in defending any such claim or demand regardless of its validity) of whatever nature or kind and by whomsoever asserted which Agent may incur or suffer by reason of its performance of this agreement.

Agent shall not be responsible for loss or damage incurred by Principal except where such loss or damage arises as a result of the gross negligence of Agent.

VI. CONFIDENTIALITY

Agent undertakes not at anytime to divulge or make known any information concerning the secrets, accounts or dealings of or in any way related to the business of Principal unless otherwise instructed by owner or required to divulge such information under penalty of law.

VII. ARBITRATION

In the event of any claim or dispute arising out of or relating to any provision of this Agreement the parties will diligently attempt an amicable resolutoin of the claim or dispute. In the event that the claim or dispute is not so resolved, it will be submitted for final settlement to a commercially acceptable arbitration procedure.

VIII. TERMINATION

This agreement will be effective from the date last written until terminated as hereinafter provided:

A. Either party shall have the right to terminate this Agreement at any time upon thirty (30) days written notice of cancellation to the other party, such cancellation to be effective thirty (30) days from receipt of such notice.

B. Should Agent abandon or terminate berth services operations in the ports specified in Article I of this Agreement.

Any termination of this Agreement shall be without prejudice to the rights and claims of the parties between themselves in respect of all matters and things arising prior to such termination.

This agreement shall cancel, revoke and supercede any previous or existing agreement between the parties hereto, whether formal or informal.

IX. ADDITIONAL SECURITY

It is expressly agreed that Agent does not rely solely on the credit of Principal for repayment of disbursements made hereunder. As further security for repayment of said disbursements, Agent is hereby granted a maritime lien for disbursements made to any vessel owned, chartered or managed by Principal.

In Witness Whereof the parties have signed this Agreement on the 14th, day of July, 1978.

Principal: _____

Robert H. Uiterwyk
Deputy to the
Managing Director
Iran Express Lines

Agent: _____

Hendrik Uiterwyk
Executive Vice-President
Uiterwyk Corporation

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BACKER NAVID, d/b/a/ NAVID BROTHERS TRADING FIRM, an Iranian National,	)	
Plaintiff,	)	
vs.	)	Case No. 81-136-CIV-T-WC-K
M. CUNLIFFE-FRASER as representative of certain UNDERWRITERS AT LLOYDS, THREADNEEDLE INSURANCE CO., et al.,	)	
Defendants.	)	

ANSWER OF DEFENDANT
IRAN EXPRESS LINES, LIMITED

Defendant, IRAN EXPRESS LINES, LIMITED, by and through its undersigned attorneys answers Plaintiff's Amended Complaint as follows:

1. Defendant denies the first sentence of paragraph 1 and is without information sufficient to form a belief as to the truth of the remainder of paragraph 1 and, therefore, denies the same.

2. Defendant is without information sufficient to form a belief as to the truth of the allegations of numbered paragraphs 2 and 3 and, therefore, denies the same.

3. Defendant denies numbered paragraph 4.

4. Defendant is without information sufficient to form a belief as to the truth of the allegations of the first and third sentences in numbered para-

graph 5 and, therefore, denies the same. Further, Defendant denies the allegation in the second sentence in numbered paragraph 5.

5. Defendant admits the allegations contained in numbered paragraph 6 however it is without information sufficient to form a belief as to the truth of the allegation that SMP is an Iranian corporation maintaining business in Tehran.

6. Defendant is without information sufficient to form a belief as to the truth of the allegations of numbered paragraphs 7 and 8 and, therefore, denies the same.

7. Defendant admits that it entered into an agreement with Plaintiff for the carriage by sea of shipment of household air conditioners on or about December 14, 1977 as contained in the allegations of numbered paragraph 9, however, it is without information sufficient to form a belief as to the truth of the remainder of the allegation and therefore denies the same. Further, Defendant admits that Exhibit B is silent as the mode of carriage but denies the remainder of the allegations of the last sentence in numbered paragraph 9.

8. Defendant is without information sufficient to form a belief as to the truth of the allegations of numbered paragraphs 10, 11 and 12, and, therefore, denies the same. Further, Defendant cannot admit nor deny the allegation that Exhibit C is a "clean" under deck ocean bill of lading until the complete bill is produced.

9. Defendant denies the allegations of numbered paragraphs 13 and 14.

10. Defendant is without information sufficient to form a belief as to the truth of the allegations of numbered paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30, and therefore, denies the same.

11. Defendant denies the allegations of numbered paragraphs 31, 32, and 33.

12. Answering numbered paragraph 34, Defendant incorporates the same answer it made to paragraphs 1-33.

13. Defendant denies the allegations of numbered paragraph 35.

14. Answering numbered paragraph 36, Defendant incorporates the same answer it made to paragraphs 1-33.

15. Defendant denies the allegations of numbered paragraph 37.

16. Answering numbered paragraph 38, Defendant incorporates the same answer as it made to paragraphs 1-33.

17. Defendant is without information sufficient to form a belief as to the truth in paragraph 39 that M/V Margitta was under charter to Defendant. Further, Defendant denies the remainder of paragraph 39.

18. Defendant denies the allegations of numbered paragraphs 40 and 41.

19. Counts IV - XI seek recovery against the other Defendants, and therefore, no response is necessary.

AFFIRMATIVE DEFENSES

21. Defendant hereby gives notice, pursuant to Federal Rule of Civil Procedure 44.1, that it intends to raise an issue as to the applicability of the law of Iran; more specifically Law 6738 enacted June of 1979 in Iran which required private corporations including Defendant herein to be administered by the Government of The Islamic Republic of Iran. Defendant may raise other Iranian law.

22. Defendant is a sovereign entity immune from the jurisdiction of this Court under the Treaty of Amity, August 15, 1955, United States — Iran, 8 U.S.T. 899, T.I.A.S. No. 3835 and under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.* (1976)("FSIA").

23. The property of Defendant is immune from attachment, arrest and execution under the Treaty of Amity and under FSIA, 28 U.S.C §§ 1330(a), 1604, 1609.

24. Service of process on Defendant is insufficient. Section 1608(b) of the FSIA establishes the only methods whereby service of process may be made on an "agency or instrumentality of a foreign state". Plaintiffs have made no attempt to serve process on Defendant in a manner that complies with the requirements of that statute.

25. This Court lacks personal jurisdiction over Defendant pursuant to 28 U.S.C. §§ 1330(b).

26. As Plaintiff and Defendant are foreign entities and the letter agreement attached to the Complaint as Exhibit B was executed in a foreign country, this Court lacks jurisdiction over the subject matter in light of the fact Plaintiff has failed to make a showing that the remedies of Iran are unavailable.

27. This action should be dismissed or transferrred pursuant to the doctrine of form nonconveniens.

28. Upon information and belief, the second page of the bill of lading may provide that disputes arising thereunder are to be settled in arbitration or in a form other than the United States courts. Further, there may be other valid defenses contained in such bill which won't be known until production.

29. Plaintiffs' claims are barred by laches.

30. Plaintiffs' cause of action is barred by the applicable statutes of limitation.

31. Any damage to the aforementioned shipment, which is denied, was caused by the act or omission of the shipper of the goods or its agents or representatives and accordingly this Defendant is not liable therefore. If a principal agent relationship is found to exist between the Defendant and Uiterwyk Corporation, Defendant cannot be liable for the allegations against Uiterwyk since Uiterwyk Corporation's acts or contracts were not within the scope of its actual or apparent authority and were outside its scope of employment with Defendant.

32. If Uiterwyk Corporation files a claim with the United States - Iran Claims Tribunal, Defendant reserves its right to bring a counterclaim pursuant to the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States of America and the Islamic Republic of Iran adhered to by the United States and Iran on January 19, 1981.

33. Any loss or damage to such shipment was due to perils, dangers, and accidents of the sea for which the Defendant is not liable.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer has been furnished by United States mail to John I. Van Voris, Esquire, Post Office Box 3324, Tampa, Florida, 33601 this 2d day of October, 1981.

Jeffrey S. Goldman, Esquire

Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

No. 82-932

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UITERWYK CORPORATION,
Petitioner

v.

CTI-CONTAINER LEASING CORPORATION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review a decision by the Court of Appeals for the Eleventh Circuit reversing, as an abuse of discretion, an order of a District Court staying an action of plaintiff, a U.S. Corporation against defendant, also a U.S. Corporation on a lease, where the defendant had moved to implead alleged Iranian entities.

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STATEMENT OF THE CASE

Plaintiff CTI-Container Leasing Corporation ("CTI"), a Delaware corporation with headquarters in New York filed suit on October 6, 1980 in the United States District Court for the Middle District of Florida in Tampa for collection of amounts due pursuant to six leases of ocean cargo containers and related equipment between CTI and defendant Uiterwyk Corporation which is a Florida corporation with headquarters in Tampa, Florida. On February 9, 1981 Uiterwyk moved for permission to implead the nation of Iran and Iran Express Lines (alleged by Uiterwyk to be an Iranian governmental entity) as third party defendants pursuant to Rule 14 Fed.R.Civ.P. (Docket No. 19). CTI opposed that motion on February 23, 1981 (Docket No. 22). On March 10, 1981 the United States Department of Justice filed the first of several "Statements of Interest" setting out the general position of the United States as a consequence of the agreements reached between Iran and the United States in connection with the release of the American hostages. The various Statements of Interest were generalized summaries filed by the Government in any case in which "Iran" was sought to be made a party. The statements were not directed to any particular case and principally related to the release of attachments of Iranian assets (there were none in the instant case) rather than to the stay of claims against Iran.[1]

The District Court, treating the Statements of Interest as "in effect, . . . a motion for a stay of these proceedings, as a result of the agreement between the United States and the Government of Iran," (App. to Pet. for Cert. 17), stayed CTI's action against Uiterwyk in addition to Uiterwyk's attempted impleader of Iran without ever even having ruled on Uiterwyk's motion to implead the alleged Iranian defendants. The order staying the litigation was ostensibly made pending "determination by the Iran-United States Claims Tribunal of its jurisdiction to hear these claims." (App. to Pet. for Cert. 17). CTI appealed.

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[1] In a Supplemental Statement of Interest filed in a related action between the same parties in Baltimore which *was* drafted specifically for this litigation the United States expressly recognized that Exec. Order No. 12,294 did not stay CTI's claim against Uiterwyk and that the Arbitration Tribunal had no jurisdiction over the CTI-Uiterwyk action. *See CTI-Container Leasing Corp. v. Uiterwyk Corp.*, 685 F.2d 1284, 1288 n.7 (11th Cir. 1982).

Based upon the Algiers Accords, and upon Exec. Order No. 12,294, the Court of Appeals For the Eleventh Circuit approved the stay of Uiterwyk's attempted third-party action against the Iranian entities. The Court of Appeals also held that neither the Accords nor the Executive Order permitted a stay of the principal action by CTI against Uiterwyk on the leases. It found that the stay imposed upon that action by the District Court was an abuse of discretion and remanded the main action case for further proceedings on the merits.

SUMMARY OF THE ARGUMENT

Rather than advancing any special and important reasons for this Court's exercise of its discretion in granting certiorari, Uiterwyk largly confines itself to rehashing arguments rejected by the Eleventh Circuit. The decision below was merely the interpretation, in the context of the particular facts of this case, of accepted and well understood principles of appellate jurisdiction and of the requirement of Exec. Order No. 12,294 and the underlying Algiers Accords. The decision represents nothing more than an exercise of the supervisory authority of the Court of Appeals and neither raises important Federal questions nor departs from established authority. There is no conflict between the decision under review and that of any other circuit court.

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO SPECIAL AND IMPORTANT REASONS COMPELLING THIS COURT TO REVIEW THE ACTION OF THE ELEVENTH CIRCUIT.

The case is founded upon uncomplicated lease contracts.

CTI is the world's largest lessor of intermodal ocean cargo containers to ocean carriers. Uiterwyk Corporation is the "general agent", "manager", "operator", and general factotum of dozens of ocean carrier corporations and lines, most of which are owned by or otherwise related to the principals in Uiterwyk Corporation.

In the middle 1970's CTI as lessor and Uiterwyk Corporation as lessee entered into a number of leases of containers which are the basis of this law suit. The Terms and Conditions of each of the leases are identical, as are the parties to the leases. Each lease calls for the application of New York law.

Beginning, chronologically, with an invoice dated August 31, 1977 (Doc. No. 17, Pltf's Req. for Adm. Ex. No. 10), (long before "Iran" became an issue), Uiterwyk failed to pay CTI its obligations under the leases and continued that nonpayment over a long period of time.

On February 6, 1980 CTI filed suit, in admiralty, in the United States District Court for the District of Maryland upon the leases cited above. The Maryland docket sheet is appended at the end of CTI's brief to the Eleventh Circuit. On March 10, 1980, Uiterwyk filed a Motion to Dismiss the Maryland Action upon the basis, *inter alia,* that venue properly lay in Florida.

Nearly six months having passed and Uiterwyk's venue motion in Maryland being unresolved, CTI on October 6, 1980, filed in the United States District Court for the Middle District of Florida in Tampa (the "Tampa Action") an action, in admiralty and diversity, identical to that filed in Maryland. (Doc. No. 1, Complaint).

On February 9, 1981 Uiterwyk moved the Court in Tampa for leave to join the nation of Iran and Iran Express Lines (IEL) (which was alleged to be an Iranian governmental agency or entity) as third party defendants. CTI, on February 23, 1981, opposed the Motion to Join the Third Party Defendants (Doc. No. 22) CTI also filed a supplemental memorandum in opposition to the motion on June 11, 1981. (Doc. No. 62)

On March 10, 1981, The United States Department of Justice filed a "Statement of Interest" reciting the terms of the Accord between the United States and Iran consequent to the settlement of the hostage crisis. (Doc. No. 27)

On April 10, 1981, CTI moved for summary judgment, (Doc. No. 47)

On June 16, 1981 the United States filed a "Supplemental Statement of Interest" in Tampa which merely attached briefs filed in other cases and drafts of regulations. (Doc. No. 65)

On June 19, 1981, six days before Uiterwyk was to respond to CTI's Motion for Summary Judgment, and without having

ruled, one way or the other, on the motion to implead Iran and Iran Express Lines as third-party defendants, the Court in Tampa stayed the entire case (Doc. No. 66) in the following terms:

> In each of these cases the United States has filed a statement of interest, and subsequent to that, a supplemental statement of interest.
>
> The statement, in effect, is a motion for a stay of these proceedings, as a result of the agreement between the United States and the Government of Iran on January 19, 1981. 46 *Fed. Reg.* 7913-32 (January 23, 1981).
>
> The Court is of the opinion that these cases should be, and they are, STAYED, pending determination by the Iran-United States Claims Tribunal of its jurisdiction to hear these claims. See Exec. Order No. 12,294, 46 *Fed. Reg.* 14,111 (Feb. 26, 1981).
>
> IT IS SO ORDERED at Tampa, Florida, this 19 day of June, 1981.

(App. to Pet. for Cert. 17). Neither Iran nor Iran Express Lines is or was a party to the Tampa action at the time of the stay. No motion to stay the entire Tampa action had been filed, and, having never been advised of the existence of any "motion to stay," CTI had never briefed the impropriety of taking such action.

CTI appealed and the Eleventh Circuit affirmed the stay of Uiterwyk's attempted third party action, and reversed the stay of the main litigation between CTI and Uiterwyk.

Rule 17.1 of the Rules of this Court embodies the rule concerning certiorari, that such review "is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." Sup. Ct. R. 17.1(a). The petition of Uiterwyk Corporation is devoid of any such special and important reasons. The decision below is simply the application of recognized authorities to the facts of this particular case, is not in conflict with the decisions of any other appellate court, and represents a proper exercise of the supervisory power of the courts of appeals over the district courts.

A. *The action of the United States Court of Appeals for the Eleventh Circuit is entirely correct and was nothing more than an exercise of the supervisory powers of the United States Courts of Appeal over the United States District Courts and as such need not be subjected to a second level of supervision by this Court.*

United States Courts of Appeals are Consitutional Courts. *Old Colony Trust Co. v. Commissioner of Internal Revenue,* 279 U.S. 716, 724 (1929). By statute, they are given direct appellate jurisdiction over final decisions and certain interlocutory decisions of the United States District Courts, 28 U.S.C. §§ 1291-1292 (1976). In addition, the rule is well established that the courts of appeals are entrusted with direct supervisory power over the District Courts within their ambit. For example, in *La Buy v. Howes Leather Co.,* 352 U.S. 249 (1957) the Court stated: "We believe that supervisory control of the District Courts by the Court of Appeals is necessary to proper judicial administration in the Federal system." *Id.* at 259-260.

The holding of the Eleventh Circuit is limited, and is precisely within the scope of its direct supervisory powers: "we conclude that the district court abused its discretion when it ordered a stay of this entire action." *CTI-Container Leasing Corp. v. Uiterwyk Corp.,* 685 F.2d 1284, 1290 (11th Cir. 1982). Thus guided, the matter was simply remanded to the District Court "for proceedings not inconsistent with this opinion." *Id.* (footnote omitted).

The decision did nothing more than correct the course of the litigation and remand the matter to the District Court for proceedings on the merits of the principal contract action. This mechanism for mundane, albeit necessary, supervisory power, and the resulting judicial economies, would be rendered nugatory if such routine review and 'course correction' were subjected unnecessarily to another level of supervision by this Court.

B. *The decision below affects nothing more than the purely local interests of the litigants.*

Petitioner Uiterwyk has attempted to frame the decisions below as involving matters of some importance: the effect of the Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 I.L.M. No. 1 224 (Jan. 1981), the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran 20 I.L.M. No. 1 224, 230 (Jan. 1981), (herein collectively referred to as the "Algiers Accords"), and Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981). A review of the opinion of the Court of Appeals discloses, however, that the appellate court did nothing more than apply to this particular case the clear guidelines of the Algiers Accords, of Exec. Order No. 12,294, and of the holding of this Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

The Algiers Accords provide, so far as is pertinent:

> It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration, relating to the Claims Settlemment and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration, relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitartion.

(Declaration of the Government of the Democratic and Popular Republic of Algeria, General Principal B, 20 I.L.M. No. 1 224 (Jan. 1981))

> An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim . . . .
>
> (Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Art. II, Para. 1, 20 I.L.M. No. 1 224, 230-31 (Jan. 1981))

Pursuant to the Algiers Accords, on February 24, 1981 President Reagan signed Exec. Order No. 12,294 which provided at Section 1:

> All claims which may be presented to the Iran-United States Claims Tribunal under the terms of Article II of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, and all claims for equitable or other judicial relief in connection with such claims, are hereby suspended, except as they may be presented to the Tribunal. During the period of this suspension, all such claims shall have no legal effect in any action now pending in any court of the United States, including the courts of any state or any locality thereof, the District of Columbia and Puerto Rico, or in any action commenced in any such court after the effective date of this Order.

Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

This Court held in *Dames & Moore v. Regan*, 453 U.S. 654 (1981) that such a suspension of litigation by U. S. citizens against the Government of Iran was valid and properly based

upon the power of the President of the United States incident to the resolution of major foreign policy disputes.

CTI is a Delaware corporation and the action it filed in the District Court in Tampa was solely against Uiterwyk Corporation, a Florida Corporation, on the basis of a straight- forward lease. Uiterwyk's third party claim was against Iran and against Iran Express Lines, an alleged "instrumentality" of the Government of Iran.[2] Responding automatically to a docket entry which mentioned the name "Iran", the United States Government filed a Statement of Interest and a Supplementary Statement of Interest which indeed it filed in identical form in all cases in which "Iran" was named. The first Statement of Interest summarized the events leading up to the Algerian Declarations, set out the contents of those Declarations, and argued at length the constitutionality of the claims settlement procedure. Its principal thrust was directed to the attachments against Iranian government assets which had followed the taking of hostages. This case involved no attachment of Iranian assets and the only "claims" against "Iran" which were arguably within the Tribunals jurisdiction were those represented by the third party motion filed by Uiterwyk.

The Supplemental Statement of Interest advised the Courts of the then recent ruling of this Court in *Dames & Moore v. Regan,* and renewed the requests concerning attachment of Iranian assets and stay of claims against Iran.[3]

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[2] Because the action has still never passed the initial pleadings stage, Uiterwyk's assertion that Iran Express Lines is an Iranian instrumentality remains only an allegation. In fact it is, or was, a private corporation owned 50% by the Uiterwyk family and 50% by the Paksimas, a family of Iranian nationals. The relationship between Uiterwyk and Iran Express Lines has been noted as being one of "extraordinary interlocking of ownership and control," *Ameejee Valleejee & Sons v. M/V Victoria U.,* 661 F.2d 310, 313 (4th Cir. 1981).

[3] In a Second Supplemental Statement of Interest filed in the Maryland action and noted in the opinion of the Eleventh Circuit below, 685 F.2d at 1288 n.7, the United States stated: "the [Algiers Accords do] not include within the jurisdiction of the Tribunal claims of a United States Corporation against another United States Corporation. Because [CTI's] claims against Uiterwyk are not arguably within the jurisdiction of the Tribunal, they are not suspended by operation of the Executive Order." United States Second Supplemental Statement of Interest at 4, *CTI-Container Leasing Corp. v. Uiterwyk Corp.,* No. JH-80-313 (D. Md. filed Feb. 8, 1980).

The District Court, so far as may be ascertained, did not examine the Algiers Accords, or Exec. Order No. 12,294, or this Court's opinion in *Dames & Moore v. Regan.* It failed even to rule on the contested motion to implead Iran. Rather, it treated the Statements of Interest filed by the United States as "in effect, . . . a motion for a stay of these proceedings, as a result of the agreement between the United States and the Government of Iran on January 19, 1981," which they were not, and then stayed the entire case "pending determination by the Iran-United States Claims Tribunal." (App. to Pet. for Cert. 17).

On appeal the Eleventh Circuit found that "he stay order as it affected Uiterwyk's third-party claims against Iran and IEL was mandatory in nature because such claims were suspended by Executive Order No. 12,294 as they are clearly within the Tribunal's jurisdiction." 685 F.2d at 1288. However, the Court of Appeals reached "a contrary conclusion concerning the stay of the principal action of CTI against Uiterwyk. This portion of the stay order was discretionary in nature as the district court was not required to stay an action between two American corporations." *Id.* (footnote omitted). The court then held that the stay of CTI's claims against Uiterwyk constituted an abuse of discretion.

> Therefore, we conclude that district court abused its discretion when it ordered a stay of this entire action. We vacate the district court's stay order and remand the action to the district court for proceedings not inconsistent with this opinion.

685 F.2d at 1290 (footnote omitted).

The actions of the Court of Appeals involved nothing more than an interpretation of the clear mandate of the Algiers Accords and Exec. Order No. 12,294 as sanctioned by this Court in *Dames & Moore v. Regan.* It touched no more than the purely local interests of CTI and Uiterwyk based upon the particular facts of this case. Even if the decision of the Court of Appeals were not so clearly correct, the import of the decision is so clearly limited to the facts of this particular case and the interest of CTI and of Uiterwyk that discretionary review on a writ of certiorari by this Court would not be justified.

C. *This case presents no other feature justifying discretionary review by this Court.*

The decision below conflicts with no decision of any other Court of Appeals.[4] Sup. Ct. R. 17.1(a); *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964). It is, rather, a straightforward and clear interpretation of the facts of this case under the available authorities, and squarely within the general supervisory powers of the Court of Appeals. It is neither a departure from the accepted and usual course of judicial proceedings nor is it "out of line with the authorities." *Braen v. Pfeifer Oil Transportation Co.*, 361 U. S. 129, 130 (1959).

In *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923) Chief Justice Taft, writing for the Court in an opinion dismissing a writ of certiorari improvidently granted, stated:

> it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Id. at 393. No feature or combination of features to be found in this case rises above the level of the oridinary, let alone to the extraordinary level of importance required for this Court to exercise its appellate review powers pursuant to a writ of certiorari.

II.

SUBSIDIARY ISSUES ADVANCED BY THE PETITIONER DO NOT MERIT THIS COURT'S REVIEW.

A. *In finding that it had jurisdiction, the Court of Appeals was acting within the clear scope of established precedent.*

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[4] The petitioner, obviously mindful of the showing required for certiorari, attempts to find a conflict between the decision below and that of certain other Courts of Appeals relating to the appealability of the order of the District Court. The appealability of the order below is squarely within longstanding and well understood standards for appellate review, as is set forth in the next section of this brief.

The Court of Appeals based its decision relating to its own jurisdiction on the rule of *Hines v. D'Artois*, 531 F.2d 726, 730 (5th Cir. 1976). 685 F.2d at 1287-88. The new Eleventh Circuit had adopted the precedent of the Fifth Circuit as binding in *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

Uiterwyk's petition is entirely devoid of even a bare mention of *Hines*, let alone any showing of how the Court of Appeals departed from this well-recognized standard, or otherwise placed itself in conflict with standards applied in any other circuit.

The care with which the Eleventh Circuit examined the basis of its jurisdiction as well as the longstanding and well understood nature of the rule in *Hines* are apparent from the opinion. Petitioner's attempt to reargue the nature of the order appealed from are not worthy of the attention of this Court. Other equally cogent bases of jurisdiction were advanced by CTI but were not reached by the Court of Appeals, 685 F.2d at 1287 n.6. Nevertheless, each remains a perfectly proper basis of appellate jurisdiction which CTI is entitled to rely on independant of the grounds utilized by the Court of Appeals. *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924).

B. *The decision of the Eleventh Circuit comports with the decision of this Court in* Landis v. North American Co.

Petitioner's assertion that the decision below is at odds with *Landis v. North American Co.*, 299 U.S. 248 (1936) rests upon nothing more substantial than an incomplete quotation from the opinion below.

After a careful examination of the rule of *Landis*, as interpreted in recent Fifth Circuit opinions, the Eleventh Circuit concluded that the stay of CTI's action against Uiterwyk constituted an abuse of discretion. Attempting to create a distinction between the word "indefinite" and the word "immoderate", referring to a stay, and as used in the opinion in *Landis*, 299 U.S. at 256, Uiterwyk departs from common English usage as well as common sense. While Uiterwyk quotes a sentence

from the opinion below, referring to the indefinite duration of the stay, it fails to quote the succeeding sentence, in which the Eleventh Circuit states: "We cannot uphold such an indefinite or immoderate stay despite Uiterwyk's argument to the contrary." 685 F.2d at 1288. The attempt to create semantic distinctions which are neither supported by the underlying case law nor properly founded upon the opinion below does not justify further scrutiny. The Eleventh Circuit clearly examined the applicable precedents, including *Landis*, and concluded that the stay ordered by the district court of CTI's claim against Uiterwyk violated those standards. It is hardly sensible to argue that sending two U.S. corporations to an Algerian-sponsored arbitration tribunal which clearly had no jurisidction over their dispute, without even a motion to do so, constituted a proper exercise of the judicial power.

C. *The actions of the Eleventh Circuit did not result in any unconstituional taking of Uiterwyk's property.*

Petitioner's argument that the action of the Court of Appeals in vacating the stay of CTI's action against Uiterwyk amounts to an "unconstitutional taking" of Uiterwyk's "property" borders on the fatuous. Even if the alleged agency contract between Uiterwyk and Iran Express Lines had anything to do with CTI,[5] an obligation to defend amounts to no more than an obligation to pay the legal costs of defense. Uiterwyk itself characterizes the right in this fashion in its own petition: "Uiterwyk must bear accrued legal expenses for which IEL has contracted to be liable and attempt to defend itself on the contracts." (Pet. for Cert. 19). The decision below in no way impared Uiterwyk's right to seek recompense for these legal expenses which presumably may be sought against IEL as a part of Uiterwyk's proceedings before the Iran-United States Claims Tribunal.

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[5] The Court of Appeals expressly found that "[t]here was no indication in the leases in question that Uiterwyk was acting as agent for Iran, IEL, or any other party," 685 F.2d at 1286 n.4, and that "[a]n alleged agency agreement between Uiterwyk and IEL is not at issue; it is the contract between CTI and Uiterwyk that is of the focus in the principal action." 685 F.2d at 1289. It should be noted that the "agency" agreement appended to Uiterwyk's Petition (App. 2 Pet. for Cert. 38-42) is entirely outside the record, is irrelevant, and is signed so far as can be garnered from the "conformed" copy, for *both* parties by a Uiterwyk. *See supra* note 2.

Indeed, this entire matter goes to a question of remedy not substance, and the very cases cited by Uiterwyk in its petition give the lie to their position. In *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398 (1934) the Court quoted Chief Justice Marshall:

> The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.

Id. at 430.

As distinct from a mere modification of remedy, the Court in *Blaisdell* characterized impairment of the obligation of the contract thus:

> The obligations of a contract are impaired by a law which rendered them invalid, or releases or extinguishes them.

Id. at 431 (footnote omitted).

The alleged right of Uiterwyk to compel Iran Express Lines to pay its cost of defense are not related to CTI's claim against Uiterwyk. In point of fact, any remedy for the alleged breach by IEL of an obligation to defend Uiterwyk is a part of Uiterwyk's third-party action and within the jurisdiction of the Claims Tribunal which the Court of Appeals held was mandatorily stayed. 685 F.2d at 1289. As this Court stated in *Dames & Moore v. Regan,* if that resulted in any unconstitutional taking of Uiterwyk's contractual rights, Uiterwyk has a remedy under the *Tucker Act,* 28 U.S.C. § 1491 (1976). 453 U.S. at 689.

The remaining points raised in the petition do not even attempt to raise special and important issues requiring intervention by this Court. They are premised on the entirely specious argument that CTI's action against Uiterwyk is within the jurisdiction of the Iran-United States Claims Tribunal. Common sense, the United States in its Second Supplemental Statement of Interest, and the Court of Appeals all recognized that

CTI's action against Uiterwyk, the claim of one United States national against another United States national on ordinary lease agreements entirely devoid of any mention of Iran or any Iranian entities, are not even colorably within the jurisdiction ambit of the Claims Tribunal and are clearly not suspended by the Algiers Accords and Exec. Order No. 12,294.

CONCLUSION

The actions of the Eleventh Circuit in this matter are entirely consistent with the facts of this case and the applicable law, and present no special or important features worthy of this Court's review. The reasons advanced by Uiterwyk for this Court's exercise of its discretion are invalid and essentially constitute either mischaracterizations of the law or attempts to reargue to this Court the case rejected by the Eleventh Circuit. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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